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ADOPTION AND AMENDMENT

OF

CONSTITUTIONS

IN

EUROPE AND AMERICA

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ADOPTION AND AMENDMENT

OF

CONSTITUTIONS

IN

EUROPE AND AMERICA

BY

CHARLES BORGEAUD

Awarded the Rossi Prize by the Law Faculty of Paris

TRANSLATED BY CHARLES D. HAZEN

PROFESSOR OF HISTORY IN SMITH COLLEGE

WITH AN INTRODUCTION BY JOHN M. VINCENT

ASSOCIATE OF THE JOHNS HOPKINS UNIVERSITY

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1895

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INTRODUCTION.

THE work here presented to English readers first came before the public in 1893 as the successful competitor for the *Prix Rossi*, awarded the previous year by the Faculty of Law of the University of Paris.[1] The themes for this competition are published long enough in advance to call forth the efforts of a high order of talent among the younger scholars of France, and being open to all comers, the prize is not awarded unless the essays form a substantial contribution to legal and political science. When, however, the subject for 1892 was announced, it was not necessary for our author to begin investigations in an untried field to see what he might learn about the matter in the space of a year; for, having been for a considerable period engaged in the study of Democracy, he was prepared to turn much accumulated knowledge and experience into this particular channel. To the friends who knew of the essay previous to its submission the award was not a surprise.

Yet the course of competition was not without its dangers, for the essayist expressed very strong opinions in opposition to doctrines taught by the very professors who were to sit in judgment on his paper. In the chapters on France and in other portions of the work where the relations of constitutional to statute law are discussed he points out plainly what seem to be false positions of the

[1] Under the title, *Établissement et Révision des Constitutions en Amérique et en Europe.* Paris, Thorin et Fils.

French jurists, both as to the character of their fundamental law and as to the relation of the French people to the making and unmaking of their constitution. Yet the essay was given the most cordial praise by those who awarded the crown.[1]

Dr. Borgeaud's published studies in political science begin with his Jena thesis of 1883, on the religious philosophy of Rousseau. In 1887 he was made Doctor in Law at Geneva on presentation of a work on the History of the Plebiscite in Antiquity.[2] This is a careful study of the conditions of ancient democracy, setting forth clearly in the atmosphere of their age the origin and development of popular rights. Owing to the peculiar conditions of life and to the prevailing conceptions of religion and law, the democracy of antiquity stands apart from that of modern times. With all the struggles for liberty, it was the freedom of the comparatively few, not of the many, that was wanted. Yet we have at least one result which connects the past with the history of modern democracy, —law comes down from the clouds and rests upon *terra firma*. In the course of that period called "ancient" by us who are a little further removed from the beginning, law, in the conception of men, ceased to be the voice of a hidden God and became the voice of the people. By this process men became gradually conscious that they had a part in the framing of those rules by which the conduct of society was regulated, though the full weight of their responsibility was left to a later age to discover. Dr. Borgeaud's work makes clearer the distinctions between ancient and modern political notions, and, in marking the limitations of popular rights, shows, at least, what one may not expect to find of precept or example in the past.

---

[1] *Distribution des Prix, Concours de 1892*, pp. 18–21.

[2] *Histoire du Plébiscite dans l'Antiquité.* Paris, E. Thorin, 1887.

Since the appearance of the *Plébiscite* the author has devoted himself to the study of modern political institutions. From time to time articles have appeared under his name in the *Annales de l'École Libre des Sciences Politiques*, on the origins of later democratic phenomena. Naturally turning his inquiries toward America, he was not content to take surface appearances of the present, but prepared himself for an understanding of the colonies and states of the Union by long and careful investigations into the conditions of Puritan England. Fruits of this study appeared in the *Annales*, and a group of those papers have been translated into English under the title "The Rise of Modern Democracy in Old and New England."[1] The results of the same researches will be seen in condensed form in the opening chapters of the present work. In opposition to recent theories the author sees little continuous Germanic survival in the government and institutions of the colonists, since despotism had largely crushed these out in public life. He returns with accumulated evidence to the older explanation that self-government in church matters gave birth to political democracy in New England.

I have said that the author was largely prepared in advance for such a work as this, but the statement should not detract from our estimate of the labour necessary to its completion. The treatment is not a mere textual codification of the most recent articles of amendment in the constitutions of the civilized world, but is an exhibit of the historical development of each, and demanded not only the examination of nearly two hundred constitutions, but a knowledge of the politics and history connected with each. If we call to mind that the United States have

[1] Translated by Mrs. Birkbeck Hill, with an appreciative preface by C. H. Firth. London, 1894.

forty-five constitutions and the Swiss Confederation has twenty-five in operation, we can form some conception of the difficulty of drawing general conclusions respecting amendment. Yet as a native of Switzerland one may expect that Dr. Borgeaud will be able to understand free institutions. A citizen of the miniature republic of Geneva, he has not only lived in the atmosphere of political theory breathed by illustrious predecessors like Rousseau, but like all his compatriots has participated in the practical rights and duties of citizenship; equally proud of his profession of letters and his captaincy in the Swiss army. At the request of his *alma mater* he is now engaged on a history of the University of Geneva.

In view of the lively interest now taken in popular rights and the increasing agitation for closer participation of the voter in the legislation of his state or municipality, it is not necessary to search for an excuse for presenting to a wider circle of readers a work which deals with the fundamental theories underlying the problems of the hour. If we wish to obtain a comparative view of the democracies of the present day, it is necessary to inquire into the primary ideas which rule their respective governments. In our search for these, no one thing reveals more clearly the prevailing conceptions of law and government in a state than the relation of the people to the building and re-building of their constitutions. The author had no intention of writing a constitutional history, still less a complete exposition of the governments of the various countries mentioned; yet by his vigorous outlines he has succeeded in giving the reader remarkably clear conceptions of the origin, growth, and present status of government in them all.

Certain positions taken by the author on constitutional questions deserve particular attention. Of great impor-

tance is his statement of the relation of statute law to constitutional law, a subject which seems to be much confused in the minds of legislators in many states. The source of this confusion in European countries the author traces to Prussia, where one early constitution was adopted under such political pressure that, ever since that time, the jurists have been bringing their theories of sovereignty and constitutional law around to fit the existing condition of things in a monarchical government. Switzerland suffers from the same trouble because so many of its jurists are educated in Germany, and in many of its little states so much tradition survives from the time when no written constitution existed.

Dr. Borgeaud might have pointed to the state constitutions of the American Union as eminent examples of the mixture of statute and fundamental law. The reasons for this will not be found in European influence, but in the gradual resumption by the people of powers formerly delegated to the legislative or executive branches of the governments. The people have become afraid of their legislatures. The full representative functions, which in earlier times were granted to the delegate, have been little by little withdrawn. Legislatures no longer elect the executive and judicial officers, but are even restricted in legislative duties, for many states fix in the constitution the earliest possible date for adjournment.

To counteract the mistakes of the law-makers, the governor has been given the power to arrest temporarily the progress of legislation by means of the veto, and the people obtain indirectly an opportunity to express their opinion. But, more illogically, the makers of constitutions have not been content to establis a framework of general principles about which a state shall be built; but they must anticipate the organizing legislature by inserting private

law or acts of ordinary criminal jurisprudence. The new constitution of New York, for instance, regulates the individual responsibility of stockholders in joint companies, — a duty more properly laid upon a statute of bankruptcy. The form of gambling called "pool-selling" is prohibited by name. The excellence of the measure and the reasons for putting the matter out of reach of the legislature are all equally obvious; but this is not constitutional law. In the endeavour to fix things once for all according to the prevailing mood of the electors, provisions even more illogical than those quoted are placed in constitutions,[1] rendering the fundamental law inelastic, and limiting the natural growth of society. If amendment is made easy, the popular sense of the stability of the state and respect for its charter of liberties are weakened.

Much confusion also arises in the attempt to regulate local and municipal government too rigidly by state constitutions. Not only is the distinction lost between fundamental and statute law, but also between general and administrative legislation. The acts of town councils and boards of aldermen are not legislative but administrative; yet constitution makers keep on ignoring this fact, and provide governments for cities, in which appear the "checks and balances" of a national union, double legislatures, executive vetoes, divided responsibility, and all the machinery for real legislation. The general legislature is often given a control of municipal government in a way not only detrimental to true democracy, but also false to the relation of legislature to administration. State oversight to maintain uniform observance of general municipal laws is a different matter from state legislation for localities; but this has not been widely apprehended by law-makers. This con-

[1] For drastic examples, see the constitutions of North and South Dakota.

fusion seems to be due to primary misapprehension of the relation of the constitution to the life of the state.

The subject of Direct Legislation is treated in this work entirely in its relation to constitutional amendment. This fact should be borne in mind when considering the strictures drawn by the author on the recent developments of the Initiative in Switzerland. Space could not be given to a discussion of the Referendum and Initiative as applied to ordinary statute law, but he has put us under obligation for a close examination of the constitutional aspects. For this is now to be a burning question in the more democratic countries of Europe and America.

The people are seeking for some means to control their legislatures. They elect, but fear and distrust, their lawmakers. It looks as if one of the remedies would be to infuse into the ancient right of petition, the right to compel the attention of representatives. Possibly the people may demand that the very words of that petition be made law. If so, it behooves the leaders of public opinion to point out that acts aimed at amendments of the statute laws of the land are trifling matters compared to changes in the fundamental constitution.

The experiments now going on in Switzerland are attracting universal attention. The participation of the people in the proposal and ratification of statute law has, in some form or another, penetrated every canton of the Confederation. In the old democracies this has been going on since the Middle Ages and excites no wonder. In the more populous states the Initiative and Referendum are modern institutions, not unanimously accepted by the people, and regarded with mixed emotions by distant observers. But in passing judgment on the matter, one fact is liable to be left out of account, namely, the really small amount of law which comes before the people for

review. When one takes an itemized account of the labours, say of an American state legislature, it will be seen that the greater part of its work is of a *quasi*-private character, or belongs to the domain of control, while only a small number of its acts are, in reality, general legislation. It is only this latter class of laws that would be subject to the Referendum or the Initiative. Hence, whatever may be the merits of these institutions, the fear of cumbering the public mind with intricate legislation is reduced to very low terms.

In endeavouring to show that Direct Legislation is no new thing in America, certain recent writers have created some confusion by citing town meetings and constitutional ratifications all together as examples of the idea. It need hardly be said that both these phenomena have a history. The constitutional referendum is developed in this book; popular law-making will stand better if treated by itself, for it is possibly an institution of the future.

Dr. Borgeaud's work is here reproduced just as offered in competition for the Rossi Prize, except that the part devoted to Switzerland was considerably enlarged before its first publication. The co-operation of the author has been freely given in bringing up to date the changes which have taken place since 1892. A few notes, added on my own responsibility, have been duly signed.

J. M. VINCENT.

JOHNS HOPKINS UNIVERSITY,
March, 1895.

AUTHORIZED TRANSLATION

AUTHOR'S PREFACE.

A CONSTITUTION is the fundamental law according to which the government of a state is organized and the relations of individuals with society as a whole are regulated. It may be either a code, a well-defined text, or a collection of such texts promulgated at a certain time by a sovereign authority, or it may be the result, more or less definite, of a series of legislative acts, ordinances, judicial decisions, precedents, and traditions of dissimilar origin and unequal value.

To the first class belong most of the constitutions of to-day. To the second belongs the oldest of them all, the one from which all the others are in a certain sense descended; namely, the English constitution. As the private law of the United Kingdom is uncodified, so also is her fundamental law unwritten. The vote of a parliamentary majority, the decision of a supreme court, may serve to expand or to contract it, and it is constantly in process of formation; it is a barrier, yielding indeed to the pressure of circumstances, when this pressure attains a certain degree of intensity, but never breaking; it is stable in spite of, or rather because of, its flexibility. We can study the growth of the English constitution, but we cannot properly speak of its adoption nor of its

revision. The decrees of Parliament, that complex power wielded conjointly by the King, the Lords, and Commons, are sovereign, but Parliament does not create the constitution. It may enact statutes which become a part of the fundamental law, but does not itself either establish or systematically revise the constitution.

This regime, the result of the political evolution of a feudal monarchy, the continuity of whose public law has never been permanently interrupted, commands admirers among liberals as well as among conservatives. Both — and the conservatives perhaps first, — will recognize its dangers, the further England advances in the direction of democracy. An unwritten constitution does not, as a whole, furnish innovators a definite, concrete point of attack. But, as it lies within the ordinary competence of Parliament to increase or diminish it by mere statutes, indirect blows may be dealt it, all the more dangerous because their aim is not immediately and generally apparent.

The present study is devoted to the process of constitution-making in those states which admit of an isolated treatment, and render possible the attainment of a general theory. It is restricted to those countries, which are, moreover, becoming more and more numerous, whose public law may be considered apart from the power which creates it, and whose political institutions are based upon a fundamental statute, emanating from this power. The author has endeavoured to treat the subject objectively, in a rigorously scientific and impartial manner. He has

tried to avoid approaching the different systems which form the object of his investigations with any intention of exploiting them for the support of the system in operation in this or that particular state.

The method employed will be found to be largely the historical. A new school, now counting among its representatives the greatest names of German science, has undertaken to solve the problems of public law, while almost completely ignoring historical considerations, and has inaugurated what is called the legal method (*méthode juridique*). This is not the place to discuss the conclusions reached by this school in regard to this or that particular constitution. These are in many ways remarkable, perhaps because of the character of the men using this method rather than because of the value of the process itself, but it must be admitted that in the domain of comparative legislation such a method may be followed by most unfortunate consequences. Nothing is more misleading than the comparison of the institutions of different societies, if made from a purely legal standpoint. This procedure may have its advantages in the study of administrative law, but it has only disadvantages in the study of constitutional law, for the political character of the latter is the predominant factor, to appreciate the importance of which, we must above all appeal to history.

Modern constitutions are not, like the best of our present codes of private law, the systematic work of jurists. They have sometimes been the result of theoretical speculations, though much less than is generally believed; at any

rate, they have never been solely the product of theory. Even during the century of philosophers, they were, in more respects than one, the work of time and circumstance. To-day they are little else. They are the great pages in the life of the nations, which it is impossible to interpret rightly apart from the book in which they have been inscribed. If we attempt to institute comparisons, to contrast the fundamental laws of one country with those of another, without having thoroughly investigated their origin, we run the risk of making the strangest blunders.

To judge a constitutional system correctly, a clear understanding of its general underlying principles is essential. We can attain this only by studying the origin of the fundamental law upon which that system is based, or by tracing the evolution of the customary law to which it conforms. Research alone, although at times difficult, can furnish the reader with conclusions based upon real facts and not upon more or less arbitrary theories.

The aim of this book is to show the possibilities of such an investigation. The largest place is given to the legislation of those countries whose public law is based upon the principle of popular sovereignty, because the states of this character are the home of written constitutions, and because with them originated the idea of regulating their adoption and revision.

PARIS, March, 1892.

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I.

THE ORIGIN, GROWTH, AND CHARACTER OF WRITTEN CONSTITUTIONS.

CHAPTER I.

THE "AGREEMENT OF THE PEOPLE."

THE conception, which may properly be called French, of a codified public law, sharply differentiated from ordinary legislation, stands to-day at the base of the modern state; the exceptions of Great Britain and Hungary not invalidating the general rule. This conception was spread abroad throughout Europe by the French Revolution. It must not, however, be forgotten that the idea of a written constitution was entertained much earlier than 1789, and that it did not originate in France.

In certain respects the idea may be traced back to the Middle Ages, and even to ancient law, to the famous *lex regia*, the source of the unlimited power of the Roman emperors. But this was only a formula expressing an unconditional delegation of sovereignty, a sort of general transfer of power, by which the prince was invested with the *imperium* and the *potestas*, without restrictions or limitations. The states of the Middle Ages were, indeed, familiar with charters by which liberties were confirmed, franchises granted, or privileges bestowed upon individuals, corporations, important vassals, orders, cities, communes, religious associations, mercantile companies, and industrial organizations, but they were not acquainted with constitutions of the type with which we are familiar, by which the rights of the individual are defined and the governing power is limited.

The constitutions adopted by the American colonies

after their emancipation from the English rule are the first which the history of modern public law records. Imitating them, the French National Assembly codified its decrees, and imposed them in this unified form upon the king, in the name of the sovereign nation. It is therefore important to show where the Americans of 1776 had found the underlying principles of their constitutions, and to point out their precise origin. Such an investigation will give us a better conception of the character, a deeper understanding of the importance, of the innovation which they effected, and which the success of the Revolution has confirmed.

"The American Revolution was not a quarrel between two peoples,—the British people and the American people, — but, like all those events which mark the progress of the British race, it was a strife between two parties, — the conservatives in both countries as one party, and the liberals in both countries as the other party, — and some of its fiercest battles were fought in the British Parliament. . . . Both peoples had a common history in the events which led to the great Rebellion; but in the reaction which followed the Restoration, that part of the British race which awaited the conflict in the old home passed again under the power of the prerogative, and, after the accession of William III. came under the domination of the great Whig families. . . . But those who emigrated to the colonies left behind them institutions which were monarchical, in Church and State, and set up institutions which were democratic. And it was to preserve, not to acquire, these democratic institutions, that the liberal party carried the country through a long and costly war."[1]

[1] Winsor, *Narrative and Critical History of America*, Vol. VI. 1–2.

Thus writes Mr. Mellen Chamberlain, former librarian of the Boston Public Library, and contributor to Mr. Justin Winsor's recent important work on the history of America. It would be difficult to indicate more clearly the real character of the American Revolution.

The great conflict which divided the Anglo-Saxon race from the close of the sixteenth century, driving forth its first victims to found New England, and ending, in 1649, in the execution of Charles I., was of a purely religious origin. This conflict had begun on the morrow of the Reformation between those who were thoroughly imbued with its spirit and had unreservedly adopted its principles with all that they logically involved, and those who remained the defenders of the ecclesiastical hierarchy and of political absolutism, holding fast to the compromise of Henry VIII., which broke with Rome without ceasing to combat Luther, and later, to that of Elizabeth, which founded the Church upon the episcopate and the royal supremacy. The Puritans, or "Nonconformists," — for such the Protestants were early called, — attacked at first the rites of the Anglican Church, but soon afterwards the episcopate and supremacy. The prince, being the head of the Church, and the interests of the latter being inseparable from the interests of the State, the quarrel was destined sooner or later to lose its religious character. The political agitation began even under Elizabeth, grew stronger under James I., the idle theorist, and became, under his son, who was too obedient to the paternal teaching, an open and victorious revolt. By that time the cause of non-conformity had become the cause of liberty.

At the culminating point of the Puritan Revolution, when Cromwell, swept on by the democratic movement, is compelled to follow it if he would become its master, a

curious constitutional project is seen coming to the surface. This is the "Agreement of the People" presented by the army to the House of Commons, for its approval and eventual submission to the people. The idea of its authors, clearly stated in the document itself, and discussed in the pamphlets of the day, was the establishment of a supreme law, placed beyond the reach of Parliament, defining the powers of that body and expressly declaring the rights which the nation reserved to itself and which no authority might touch with impunity. This popular compact was to receive the personal adhesion of the citizens, according to a special procedure therein provided. Its promulgation depended upon its acceptance by the people.[1] In the preliminary plan adopted by the regiments and submitted in 1647 to the General Council of the army is found this remarkable declaration: —

"That the power of this, and all future Representatives of this Nation, is inferior only to theirs who chuse them, and doth extend, without the consent or concurrence of any other person or persons, to the enacting, altering, and repealing of Lawes; to the erecting and abolishing of Offices and Courts; to the appointing, removing, and calling to account Magistrates, and Officers of all degrees; to the making War and Peace, to the treating with forraigne States: And generally, to whatsoever is not expressly, or implyedly reserved by the represented themselves."

We read further on in the declaration of rights of the nation: —

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[1] See the address delivered in the House of Commons, Jan. 20, 1648–49. Cobbett's *Parliamentary History of England*, London, 1808, III. 1263 seq.

"That in all Laws made, or to be made, every person may be bound alike, and that no Tenure, Estate, Charter, Degree, Birth, or place, do confer any exemption from the ordinary Course of Legall proceedings, whereunto others are subjected."

The authors of the Agreement of the People formed, so to speak, the Left of the Puritan Party. They were the "Independents" from whose ranks the army was largely recruited, and whose valour had won victory for Cromwell at Marston Moor and Naseby. Toleration of all Christians was their rallying cry. Their self-governed churches, free from all hierarchy, were founded upon a compact or Covenant, adopted by the members of the congregation and forming its constitution: "It is in virtue of this act," said one of the fathers of the Puritan doctrine, "that the ministers have power over the people of the faith, that the people have an interest in their ministers, and that each member of the congregation acquires rights and duties in respect to his fellow-members." [1]

Ecclesiastical supremacy belonged to the congregation, and to the congregation alone, as Christ's representative on earth. The assembly of the faithful, the visible source of all power, chose its own ministers, elders, and deacons, and itself exercised the power of excommunication.

We can easily understand how men thus accustomed to democracy in the Church were tempted to try it in the State. Upon the point of founding a republic, they went about it in the same way as they would to organize a church congregation. They wished to base it upon a

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[1] John Cotton, *The Way of the Churches of Christ*, London, 1645, p. 2.

formal compact, emanating from the social body, which they naturally were compelled to regard as the possessor of sovereignty. Furthermore, these democrats, who more than once during the Revolution, seemed to see the reward of all their labours about to pass to Parliament alone, had learned through hard experience the necessity of an act expressly limiting the power of the legislature and guaranteeing the rights of the people.

"I believe," wrote one of their leaders, "that the freedomes of this Nation will never be secure, untill the extent of the power and trust of the people's reservations to themselves be clearly declared." [1]

Out of this situation and these ideas grew the plan of the Agreement of the People.

This constitution, in which Cromwell no more believed than did Parliament, remained a mere project. Nevertheless, several of the reforms here aimed at were carried out under the Protectorate, and, in 1653, that regime was itself established upon a written constitution, the "Instrument of Government," drawn up by a council of army officers.[2] The necessity of such an act, which should be beyond the competence of Parliament, was recognized by the Protector in these words: —

"In every Government there must be Somewhat Fundamental, Somewhat like a Magna Charta, which should be standing, be inalterable. . . . That Parliaments should not make themselves perpetual is a Fundamental. Of what assurance is a *Law* to prevent so great an evil, if it lie in the same Legislature to *unlaw* it again. Is such a Law like to be lasting? It will be a rope of sand; it will give

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[1] John Wildman, *Truth's Triumph*, London, 1647–8, p. 11.

[2] Gardiner, *The Constitutional Documents of the Puritan Revolution*, p. 314 seq.

no security; for the same men may unbuild what they have built."[1]

Cromwell forgot the most important part of the lesson taught him by his soldiers; namely, that in republics, however strong, a durable edifice must be founded upon the will of the nation. The Instrument of Government had been drawn up by his council of officers; it might be overthrown by Monk.

England has had no other written constitution.

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[1] Carlyle, *Oliver Cromwell's Letters and Speeches*, Part VIII. Speech III. (September 12, 1654).

CHAPTER II.

THE FIRST AMERICAN CONSTITUTIONS OF THE SEVENTEENTH CENTURY.

For its firm establishment and free development the Puritan democracy required a virgin soil. This it found beyond the ocean. In 1620, five years before the accession of Charles I., a body of fugitive Congregationalists broke away from the Old World and its feudalism. These are the men whom American History reverently calls the "Pilgrim Fathers." On the point of landing and founding New Plymouth, they formed themselves into a body politic by a solemn compact signed by all the adult males of the company. By this act, drawn up in imitation of their church covenants, the colony was instituted.

In it we find the following : —

"And by virtue hereof [we] do enact, constitute and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience." [1]

From that time on, during the whole of the first period of colonization, we find a series of similar acts, called Plantation Covenants, by virtue of which the New Eng-

[1] Ben. Perley Poore, *The Federal and State Constitutions of the United States*, Washington, 1877, I. 931.

land colonists organized their political communities. One of these, that of Connecticut, soon became a real constitution, being adopted in 1639 and thus preceding by several years the *Agreement* of the English democrats. The same religious ideas presided over its inception.

The pioneers of Connecticut had withdrawn from the older colony of Massachusetts Bay because of political differences. Being consistent Congregationalists and advanced democrats, they were the first to reach those principles which we have seen the Independents supporting in the mother country. In 1638, their pastor, Thomas Hooker, soul and leader of the new emigration, developed the following theses in a sermon preserved to us by the notes of an auditor: —

"That the choice of public magistrates belongs unto the people, by God's own allowances."

"They who have the power to appoint officers and magistrates, have the right also to set the bounds and limitations of the power and place unto which they call them. And this, first, because the foundation of authority is laid in the free consent of the people." [1]

The constitution which sought to apply this formula, and whose 250th anniversary was celebrated at Hartford in 1889, is known in the United States as *The Fundamental Orders of Connecticut.* It was adopted by the inhabitants of Windsor, Hartford, and Wethersfield, united in general assembly.

Such was also the case with the most important amendments afterwards added to it. The text is inserted in the official collection, published in 1877 by order of the Sen-

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[1] *Collections of the Connecticut Historical Society*, Hartford, 1860, I. 19 seq.

ate at Washington. There the following declaration is to be found: —

"And well knowing where a people are gathered togather the word of God requires that to mayntayne the piece and vnion of such people there should be an orderly and decent Gouernment established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selues to be as one Publike State or Commonwelth; and doe, for our selues and our Successors and such as shall be adioyned to att any tyme hereafter, enter into Combination and Confederation togather, to mayntayne and p^r^searue the liberty and purity of the gospell of our Lord Jesus wch we now p^r^fesse, as also the disciplyne of the Churches, wch according to the truth of the said gospell is now practised amonst vs; As also in o^r^ Ciuell affaires to be guided and gouerned according to such Lawes, Rules, Orders, and decrees as shall be made, ordered and decreed, as followeth."[1]

This preamble introduces eleven fundamental articles which establish the sovereignty of the General Assembly of Citizens, the annual election of magistrates by the people, town autonomy, etc.

Similar documents are to be found in the colonial archives of Rhode Island, whose earliest institutions were established by other refugees from Massachusetts under the auspices of Roger Williams, the first apostle of the liberty of conscience. In 1641, the General Assembly of the colonists of the island which still bears the Indian name Aquidneck, adopted this decree: —

"It is ordered and unanimously agreed upon, that the

[1] Ben. Perley Poore, Ibid. I. 249.

Government which this Bodie Politick doth attend vnto in this Island, and the Jurisdiction thereof, in favour of our Prince is a *Democracie* or Popular Government; that is to say, It is in the Powre of the Body of Freemen orderly assembled, or the major part of them, to make or constitute Just Lawes, by which they will be regulated, and to depute from among themselves such Ministers as shall see them faithfully executed between Man and Man."[1]

Here again it is Puritan Congregationalists who thus inaugurate "popular government."

The Connecticut and Rhode Island colonists succeeded in obtaining charters from the Crown confirming the political regime which they had themselves instituted. These charters withstood the shock of the Revolution and remained in force down into the present century. Both dated from the reign of Charles I; that of Connecticut remaining unaltered till 1818; that of Rhode Island, her second charter, till 1842.

The constitution of Massachusetts Bay, the largest of the New England colonies, had been defined at the very beginning by a royal charter. This was, however, the charter of a trading and missionary corporation, and its provisions, going back to the customs of the old mediæval guilds, lent themselves easily to a democratic interpretation. Everything tends to show that the impulse would have been given in this direction, even if Roger Williams and Thomas Hooker had not been compelled to seek liberty in new solitudes, and the Great Revolution had not recalled to the mother country most of those who sympathized with the Independents. This double exodus of the liberals arrested the movement. Those who remained

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[1] *Records of the Colony of Rhode Island and Providence Plantations in New England*, Providence, R.I., 1856, I. 112.

in undisputed authority in the colony of which Boston was the centre represented the tendency of Puritanism toward strong government. The regime into which they were led was a theocratic aristocracy. But in the following century, in consequence of a religious evolution which brought the Congregationalism of their descendants back to the principles of Hooker, Massachusetts experienced that impulse toward democracy which was to place her at the head of the American Revolution.

The initiator of this evolution, Pastor John Wyse, of Ipswich, in a work called *A Vindication of the Government of New England Churches*, in which he treats of political society almost as much as of religious, expounded his theory of the origin of a state. He expresses himself on this subject as follows: —

"Let us conceive in our mind a multitude of men, all naturally free and equal, going about voluntarily to erect themselves into a new commonwealth. Now their condition being such, to bring themselves into a politick body, they must needs enter into divers covenants.

"1. They must interchangeably each man covenant to join in one lasting society, that they may be capable to concert the measures of their safety by a public vote.

"2. A vote or decree must then nextly pass to set up some particular species of government over them. And if they are joined in their first compact upon absolute terms to stand to the decision of the first vote concerning the species of government, then all are bound by the majority to acquiesce in that particular form thereby settled, though their own private opinion inclines them to some other model." [1]

[1] *A Vindication of the Government of New England Churches. Drawn from Antiquity; the Light of Nature; Holy Scripture; its Holy Nature; and from the Dignity Divine Providence has put upon it.* Boston, 1772, p. 29. (*Brit. Mus.* 4183 aaa. 54.)

CHAPTER III.

THE CONSTITUTIONS OF THE UNITED STATES.

JOHN WYSE'S treatise, published in 1717, was twice reprinted in 1772. At that moment the natural rights and social contract theory reigned triumphant in Boston. Not only was it taught from the pulpit, as in harmony with the doctrine from which the church covenants were derived, but philosophy had also taken it up with enthusiasm. Locke, who had previously received this doctrine at Westminster College from his Independent masters, and had expounded it systematically, was the theme of constant discussion both in the press and on the platform.

On the 20th of November, 1772, the first of the American declarations of rights was presented to an assembly of the citizens of Boston by James Otis, a famous lawyer, who, in a celebrated plea, eleven years before, had thrown down the gauntlet to the government of George III., and by Samuel Adams, who has been called the last Puritan, and whom Jefferson considered the "pilot of the Revolution." It bore the title "Declaration of the Rights of the Colonists, as Men, Christians, and Citizens." This manifesto, which at once received the enthusiastic support of all the towns of Massachusetts, began as follows: —

"Among the natural rights of the Colonists are these: *First*, a right to life; *Secondly*, to liberty; *Thirdly*, to property; together with the right to support and defend them in the best manner they can. These are evident

branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.

"All men have a right to remain in a state of nature as long as they please; and in the case of intolerable oppression, civil or religious, to leave the society they belong to, and enter into another.

"When men enter into society it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions and previous limitations as form an equitable *original compact.*"[1]

The men who were charged, before and after the Declaration of Independence, with organizing the liberated colonies into free states, had before them the example of New England, that "leaven of the New World," as Laboulaye somewhere calls her. Her representatives at the Philadelphia Congress played a leading part in its deliberations. The most influential among them was John Adams, destined to succeed Washington in the Presidency. At his suggestion Congress adopted, in the sessions of the 10th and 15th of May, 1776, the following resolution: —

"Whereas his Britannic majesty in conjunction with the lords and commons of Great Britain has, by a late act of parliament, excluded the inhabitants of these United Colonies from the protection of his crown . . . and it is necessary that every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted under the authority of the people of the colonies, . . . Therefore resolved; That it be recommended to the respective assemblies and conventions of

[1] William V. Wells, *The Life and Public Services of Samuel Adams*, Boston, I. 502 seq.

the United Colonies, where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular and America in general."[1]

The adoption of written constitutions is not expressly provided for by this resolution, but such was the thought of its authors, as it was of those who were charged with its execution. Their conception of the State, as being formed upon an explicit agreement of the citizens; the recollection of the political covenants which the earliest Puritan colonists had formed; the example of the charters under which the governments of several of the colonies had been organized; the necessity of legislating in the name of the people; all contributed to a revival and a wider development of the idea formerly entertained by the fathers of Anglo-Saxon democracy, in the old country as in the new.

Even before the May resolution had been promulgated, certain colonies had applied individually to Congress and had been advised "to call a full and free representation of the people, and that the representatives, if they think it necessary, establish such a form of government, as in their judgment will best produce the happiness of the people, and most effectually secure peace and good order in the province, during the continuance of the present dispute between Great Britain and the colonists."[2]

The result of this was the establishment of provisional constitutions, in New Hampshire (January 5, 1776) and

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[1] *Journal of Congress*, Philadelphia, 1777, Vol. II. 166–174.

[2] Sessions of November 3 and 4, 1775. *Journal of Congress*, I. 219.

South Carolina (March 26). The formal resolution gave the signal for general action, and complete constitutions were framed in most of the colonies. On the 12th of June, the Virginian Assembly, sitting at Williamsburg, promulgated the famous Declaration of Rights which has to a greater or less degree served as a model for all the others, and, shortly after, June 28, adopted the constitution, in which no alterations were made before 1830. State organization was completed almost simultaneously in 1776 in New Jersey (July 2), Delaware (September 20), Pennsylvania (September 28), Maryland (November 9), and North Carolina (December 18). Rhode Island and Connecticut simply confirmed their ancient democratic charters, only substituting the name of the people for that of the king. Georgia adopted her first constitution February 5, 1777, and New York adopted one April 20th, the same year.

Massachusetts did not abolish her provisional government until 1780; but her constitution was considered the most perfect expression of the American theory, as understood at the close of the Revolution. This constitution, discussed and adopted by a constitutional convention and submitted to the decision of the people, had been drawn up by a committee composed of the two Adams and Bowdoin, the president of the Assembly, and was based upon a previous plan outlined by John Adams himself. Having served as the principal model of the Federal Convention of 1787, and later of the assemblies called to revise the first state constitutions, this remarkable act remains to this day the fundamental law of the republic of Massachusetts. It marks both the starting-point of the evolution of modern public law and its present position. The preamble, composed according to the taste of the period, reads like a page from the *Contrat Social*, and is thus conceived: —

"The end of the institution, maintenance and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the powers of enjoying, in safety and tranquillity, their natural rights and the blessings of life; and whenever these great objects are not obtained the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

"The body-politic is formed by a voluntary association of individuals: it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and faithful execution of them; that every man may, at all times, find his security in them.

"We, therefore, the people of Massachusetts, acknowledging with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish the following declaration of rights and frame of government as the constitution of the commonwealth of Massachusetts."[1]

We seem to be reading Jean Jacques. It was not, however, so much from Rousseau as from his predecessors,

[1] Constitution of Massachusetts.

Wyse and Locke, that the legislators of Massachusetts received their inspiration, yet we can see in their profession of political faith, the importance attached to the celebrated theory which is its fundamental dogma.

Nowadays we refute this thesis, which we wrongly attribute to the Geneva philosopher alone, by saying that no society has ever commenced by a contract, that men live together in society as naturally as bees do in a swarm. In the name of history and common sense, we wage war against this sophist. But if, instead of considering this theory an explanation of the material fact of the formation of societies, — which does not necessarily follow from Rousseau's argument, — we regard it as an hypothesis in pure law, intended to explain the reciprocal relations of individuals, citizens of a free state, we shall judge it far differently. There is evidence enough to show that in all probability the author of the *Contrat Social* really meant it to be taken in that way.

However that may have been, the conception just mentioned was the one held by the authors of the Massachusetts constitution. The committee's plan, adopted by the majority vote of the Assembly, was submitted to the people and was ratified by them in their town meetings, also by a majority vote. It was not, however, despite the letter of the text, a case of real contract between individuals, but rather a fundamental law, enacted by the people, and placed by them at the base of their government, to serve as the supreme guiding rule of the three powers of legislation, interpretation, and administration.

CHAPTER IV.

THE AMERICAN IDEA IN FRANCE.

JOHN ADAMS had hardly finished his plan for a constitution before he was compelled to embark for Europe. Charged, for the second time, with a mission to Louis XVI., he sailed, November 13, 1779, carrying his scheme with him, to show to friends of his country in France. Franklin, who had just succeeded Voltaire in public favour, had preceded him, bearing his own production, the Pennsylvania constitution. At that moment the thought of American liberty inspired Paris and all France with enthusiasm, for she had greatly contributed to the birth of this freedom through her military aid. Proud of this, and finding the principles proclaimed in the United States in harmony with the aspirations which her historical experience and the progress of her philosophy had aroused in her, France eagerly adopted the new formulas.

In 1783, Franklin, at that time living in Passy, caused all the constitutions of America to be translated and published. This collection at once became famous.[1] Everywhere the constitutions were warmly discussed,—in the salons, at the clubs, at court, in the city, in the country. Those who argued against them, in favour of the English form of liberty, a liberty obtained by the gradual evolu-

[1] See, in Franklin's correspondence, a letter addressed to M. de Vergennes, dated March 24, 1783, and another to the President of Congress, dated December 25, the same year.

tion of customary law, met with some success among the privileged orders. Yet the nobility was itself divided, for the younger nobles rallied gladly around Lafayette, Noailles, Lameth, and their colleagues in the War of Independence, popularly called "the Americans." Public opinion condemned England. In 1787 the new Federal Constitution reached Paris, giving a new impetus to the dissertations of the philosophers, new life to the universal discussions. The French were already more jealous of popular liberties than was the Philadelphia Convention. They were troubled at not finding in the federal document drawn up by that body, a Declaration of the Rights of Man.[1]

In view of these facts, it would have been astonishing if these American ideas had not played a rôle, and an important one, in the cahiers of 1789. Those of the nobility and clergy admit, in general, that France already possesses a constitution, based upon the hereditary monarchy and the three orders. But those of the Third Estate, which "is as yet *nothing* and is shortly to become *everything*," demand almost unanimously that the coming Assembly, in which they wish to have the orders unite, shall adopt a declaration of rights and determine the basis of a written constitution, before granting any tax or enacting any legislation.

"A glorious revolution is approaching." Thus speaks the Third Estate of the suburb of Paris, thereby voicing public sentiment, says Henry Martin. "The foremost nation of Europe is about to give itself a political constitution; that is, an indestructible life in which abuses of power will be impossible."[2]

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[1] See letters of Lafayette to Washington, January 1 and February 4, 1788, *Mémoires et Correspondance de Lafayette*, published by his family, Paris, 1837-1838, II. 216, 222.

[2] *Histoire de France depuis* 1789, Paris, 1878, I. 1.

A fundamental law, made by the nation itself and intended to protect the State against the abuses of authority, this is indeed the definition of the modern democratic constitution. Sieyès thought himself the inventor of it.[1] Lafayette protested, in favour of America, against a pretension historically so unwarranted.[2]

This idea, which the people's representatives swore in the Tennis Court they would realize, has remained, despite dictatorships, one of the dominant ideas of the French Revolution. The form of the government has experienced the most rapid and extraordinary changes, the conception of the rights of individuals has become alternately larger and smaller, but the principle of a fundamental written act, the formal expression of the national will, has remained the legal basis of all the regimes which have issued from 1789. When the Revolution spread throughout Europe, this idea sprang up everywhere in the wake of her victorious armies. In Holland, in Italy, in Switzerland, there arose upon the ruins of the ancient established orders constitutions similar to the one submitted by the Convention to the primary assemblies of the Year III.

Bonaparte will overthrow both model and imitations. He will rule as master, but he will pay homage to the principle of the sovereignty of the nation. He will govern by virtue of a popularly sanctioned constitution. The Emperor will, indeed, possess unlimited power. He will compel Europe to march behind him, as he would an army corps, deciding by his decrees the fate of nations, as a general decides the fate of his regiments in arranging them in the order of battle, yet the Revolution will remain above him, more powerful than he.

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[1] *Discours sur le projet de constitution de l'an* III. *Moniteur*, Thermidor 7 (July 25, 1795).

[2] *Mémoires*, IV. 36.

"The capacity, the inordinate ambition of Napoleon himself and his most influential ministers are subject to this power and will remain subject to it, however distasteful it may be to them. It cannot be denied that, despite the iron despotism with which he governs, he follows in many matters of the first importance the principles of the Revolution, before which he must bow, at least in appearance."

Such was the opinion of Prince Hardenberg, who will hardly be accused of being too favourable, given in a secret report, recently published by Ranke, which Hardenberg made in 1807 soon after the battle of Jena to his sovereign on the reorganization of the Prussian monarchy.[1]

When the conqueror in the treatment of international affairs adopted a different plan from that of a general giving orders in hostile territory, he favoured the establishment of constitutions. These have not remained without influence upon the future development of the States which were subjected temporarily to the hegemony of the Empire.

Finally, the *Acte additionnel*, which the despot proposed for France during the Hundred Days, had been drawn up, as we know, by Benjamin Constant, one of the most liberal of contemporary publicists, and this act received, with some slight reservations, the significant approval of Lafayette.

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[1] *Denkwürdigkeiten des Staatskanzlers Fürsten von Hardenberg*, herausgegeben von Leopold von Ranke. Leipsic, 1877, V. (Acten-stücke), p. 8.

CHAPTER V.

THE FRENCH SYSTEM IN EUROPE.

BEFORE Napoleon's final fall the Revolution had spread throughout Europe. Even its most passionate enemies had been able to conquer it only by adopting its own weapons. "Democratic principles in a monarchical government," says Hardenberg, wishing to express the new relation by a simple formula, "seem to me to constitute the plan most in harmony with the spirit of the age."[1]

The realization of this programme was the work of Stein. Prussia, crushed at Jena, recovered her strength, maintained her independence, and, seven years later, led Germany to victory.

The triumph of the Holy Alliance, founded in the name of legitimacy and divine right, was to be the signal for a reaction. It cannot be said to have been the signal for a counter-revolution. In the Congress of Vienna, in the committee which laboriously wrought out the plan of the German Confederation, the Prussian delegates demanded, as one of the conditions of the adhesion of their government, the establishment of representative assemblies in the different States of the Confederation.

Neither Hardenberg, nor Stein, was a partisan of written constitutions, both regarding them as too open to criticism, as likely to encourage extravagant "meta-

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[1] Hardenberg, Ibid. p. 8.

political" speculations.[1] They both preferred the English system, but, being called upon to determine the conditions which should govern the life of a new political organism, they were really compelled to resort to the agency of a written constitution. Their plan, infinitely too liberal for the Austria of Metternich, was not adopted; but something had to be put in its place and the German Confederation was given a constitution in thirteen articles. The last ran as follows: —

"In all the countries belonging to the Confederation there will be assemblies of the estates."

("In allen Bundesstaaten wird eine landstaendische Verfassung stattfinden.")

Writers have sometimes translated "landstaendische Verfassung" by "a representative constitution" and have accordingly ascribed the establishment of a constitutional regime in Germany to the Congress of Vienna. This is an error. The question was raised in the conferences of the German delegates, but the adversaries of a liberal solution adroitly made use of the repugnance manifested by the smaller States towards any arrangement which might seem to threaten their individual sovereignties. Thus Article XIII. received an equivocal wording.[2]

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[1] Letter from Stein to Eichhorn, January 7, 1818, cited by Seeley, *Life and Times of Stein*, London, 1878, II. 403.

[2] "Second Protocol of the Conferences upon the Establishment of the German Confederation. Session of May 26, 1815 (the plan of union, presented by Metternich and Hardenberg is under discussion), Art. X.: 'In all the counties of the Confederation there shall be assemblies of the estates.' Bavaria, Saxony, and Hesse-Darmstadt declared themselves in favour of this article; the representatives of the princes proposed the following addition: 'The right to take part in the discussion of general laws and money grants, as well as the right of petition shall be accorded the estates; in case a State already has an established constitution the

A compact, similar in form, prepared by the Diet of the Swiss Cantons, sitting at Zürich, was approved by the Committee on Swiss affairs. This document, known in Switzerland as *The Agreement of 1815*, was inspired by Bonaparte's *Act of Mediation*, drawn up at the Malmaison conference. It regarded the point as already won that the public law of the different cantons was, or should be, codified. The contracting States mutually guaranteed each other's constitutions, and a copy of them was to be deposited in the archives of the Diet.

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rights already acquired shall be maintained.' Luxemburg and Holstein announced their concurrence in the proposed article." D'Angeberg. *Le Congrès de Vienne*, II. 1235.

Fourth Protocol. Session of May 20, 1815.

"Art. X. This article having been discussed, chiefly with the additional phrase proposed by the representatives of the princes; the representative of the King of the Netherlands having added his note to the protocol, under the No. 7, it was considered impossible to enter then into the details of the rights of the estates which vary somewhat with the locality; consequently, while waiting till a better statement might be agreed upon, it was decreed that the article be briefly formulated as follows: 'There shall be assemblies of the estates in all the countries of the Confederation' (Art. XIII. of the Act of June 8, 1815)." (Ibid. II. 1277.)

"*Addition No. 7. Note of the plenipotentiary of the King of the Netherlands, Grand Duke of Luxemburg, upon Art. X. of the plan:* —

"The plenipotentiary of Luxemburg considers this article too meagre and inadequate. What would they have said in England, under John Lackland, or what would have happened there, had it been decreed that there would be a Magna Charta and a Parliament, without a statement of what would be confirmed in the former and transacted in the latter?

"This plenipotentiary has endeavoured to ascertain the different opinions of the different members and hopes to satisfy all by proposing the following phraseology: 'The members of the Confederation agree to establish in all the States of Germany a representative constitution, or one of the estates (Stände), by which constitution the estates shall be guaranteed the right of being consulted in all general legislation, of consenting to taxes, and of petitioning the sovereign, unless similar constitutions and institutions already exist, in which case these countries shall be guaranteed the possession of their acquired rights'" (Ibid. II. 1280).

No similar provision bound the princes of the German Confederation; but those whose States had been most open to French influence were soon considering the matter of the framing of constitutional charters, more or less similar to the one just granted his subjects by Louis XVIII. As early as September 2, 1814, before the opening of the Congress of Vienna the duchy of Nassau had obtained hers, this being the first of a series of documents which have played a most important rôle in the development of modern Germany. Under Napoleon's protectorate, the kingdoms of Westphalia and Bavaria, the duchy of Saxe-Weimar, the grand duchy of Frankfort, the principality of Anhalt-Coethen, possessed paper constitutions; but on account of the difficulties of all sorts, against which the rulers of these States had to contend during the period of the *Rheinbund*, it was impossible to apply any one of them in its entirety.[1]

Before starting for Vienna in September, 1814, the Count de Montgelas, Minister of the King of Bavaria, called together a committee on revision. After Prussia had made known her views about a federal regime, this committee was ordered to hasten its labours. The King of Würtemberg and the Grand-duke of Baden took similar steps and caused charters to be prepared.[2] The Princes of Schwarzburg-Rudolstadt, of Schaumburg, and Waldeck, the Grand-duke of Saxe-Weimar-Eisenach soon followed their example. Being less trammelled by their subjects, they anticipated the sovereigns of the south in the com-

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[1] Westphalia, November 15, 1807; Bavaria, May 1, 1808; Saxe-Weimar, September 20, 1809; Frankfort, August 16, 1810; Anhalt-Coethen, December 28, 1810.

[2] Administrative difficulties delayed the promulgation in Bavaria and Baden until 1818; in Würtemberg until 1819.

pletion of their work.[1] In 1820 an article of the *Final Act* of Vienna, supplementary to the articles of confederation, added to the stipulations of these the further provision, that at the demand of the governments interested, the Federal Diet might guarantee the constitutions established in the different States. This provision would have assured the speedy triumph of written charters, the only ones really capable of being efficiently guaranteed, had not the Diet, from 1822 on, systematically refused all demands of this character. Prussia had, as we know, suddenly wheeled clear about and, renouncing the liberalism which she was the first to adopt, had been for several years Metternich's docile auxiliary. The work of constitution making throughout the Confederation was temporarily arrested only to resume its onward march seven years later. Hanover had received her charter December 7, 1819, Brunswick April 25, 1820, the grand duchy of Hesse, December 17, of the same year. The duchy of Saxe-Meiningen received hers in 1829, Electoral Hesse, the duchy of Saxe-Altenburg, the kingdom of Saxony theirs in 1831, the principality of Hohenzollern-Sigmaringen in 1833, Lippe in 1836.

Soon arose the great democratic movement which was to end in the election of the "Frankfort Parliament," and in the generous and vain attempt to found a liberal empire under the leadership of Prussia. To this period belong: the constitution adopted by the Senate and the Colleges of the Burgesses, of the city of Lübeck (1846); those of the duchies of Anhalt and the one granted by the King of Prussia (1848); then the first one granted by the emperor

[1] Schwarzburg-Rudolstadt, January 8, 1816; Schaumburg-Lippe, January 15, 1816; Waldeck, April 19; Saxe-Weimar-Eisenach, May 5. In the train of these we may mention those of Saxe-Hildburghausen, March 19, 1818; and the principality of Lichtenstein, November 9.

of Austria; those of the city of Bremen, the duchy of Oldenburg, the principality of Reuss-Schleiz (1849), and a number of revisions, or, more accurately, of attempts to revise existing charters, undertaken by assemblies chosen for this purpose.

We know full well the outcome of Germany's dream of liberty. We know the repression that followed. Under this reaction the development of political institutions naturally suffered, but the year 1848, which had heard all the intelligence and enthusiasm of Germany express the national longing for unity and progress, could not be blotted out of memory. That moment of great national exaltation was destined to exert an influence upon the future, far more profound, far more fruitful, than all the reactions.

Hamburg obtained her constitution in 1860. The principality of Reuss-Greiz received hers in 1867, soon after the transformation of the German Confederation of 1815 into the North German Confederation, from which Prussia had excluded her rival Austria.

One after another, the other countries of Europe have likewise adopted the French idea of a fundamental law. The only exceptions to this rule to-day, save the petty states of Val-d'Andorre, Monaco, and San Marino, are the Russian and Ottoman empires, which, in a political sense, have not yet entered the era of modern civilization; Montenegro, in much the same condition; Hungary and Slavonic Croatia, which, within the limits of the compacts which unite them to each other and connect them with the Austrian monarchy, have preserved their own internal organization, a regime resembling the English; and, finally in the heart of the German Empire, founded in 1871, under the hegemony of Prussia, the duchies of Mecklenburg, which, despite the general example, despite

repeated votes of the Reichstag, persist in maintaining their mediæval institutions.

Spain owes her first constitution to Joseph Bonaparte. Formally discussed, in 1808, at Bayonne, by an assembly of notables, this yielded in 1812 to the one adopted by the Cortes, which was accepted and then overthrown in 1823 by Ferdinand VIII., and has since been replaced either by royal charters or by constitutions framed by constitutional conventions, according to the prevailing regime.

Portugal adopted in September, 1822, a constitution based upon that of the Spanish Cortes. It was suppressed by King John VI., in 1824, being in the eyes of the court too liberal. In 1826, the successor of John VI., Pedro I., Emperor of Brazil and King of Portugal, at the moment of abdicating the latter throne in favour of his daughter, Dona Maria, granted the constitution which remains to-day, after so many vicissitudes, civil wars, two restorations, and several revisions, the fundamental law of the realm.

The constitution of modern Sweden dates from 1809, that of Norway, from 1814,[1] that of Denmark, from 1849. The Netherlands, whose unity was effected through the establishment of the Batavian Republic, had its first constitution under that regime. It was adopted by a vote of the people in 1798, and was revised first in 1801, then in 1805, as a result of the events which transpired in France in the Year VIII. and Year X. King Louis Bonaparte issued a new constitution in 1806. Finally, in 1814, Prince William Frederick, on his return to his country, caused the adoption, first by an assembly of notables which met in Amsterdam, and later, after he had received the crown of the Netherlands, by the States-General of

[1] Act of Union of Sweden and Norway, 1815.

Holland, of the provisions which still remain the basis of the political organization of the kingdom.[1]

The *Fundamental Statute* of Italy was granted, in 1848, by Charles Albert to his Piedmontese and Sardinian subjects, and has been extended successively, in 1859, 1860, 1866, and 1870, to the annexed countries.

This statute had had nineteen precedents in the various documents promulgated in the different states of the peninsula since the Cisalpine constitution of 1797.[2] It was followed by three others: the Fundamental Statute

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[1] In Belgium, the plan was rejected by an assembly of notables. It was, nevertheless, proclaimed by the king, August 24, 1815.

[2] 1. Constitution of the Cisalpine Republic, proclaimed at Modena, March 27, 1797, in 378 articles, fashioned after the French constitution of the Year III.

2. Constitution of the Cisalpine Republic, given by Bonaparte, and proclaimed at Milan, July 9, 1797 (21 Messidor an V.).

3. Constitution of the people of Liguria, in 396 articles, approved December 2, 1797, in popular meetings.

4. Constitution of the Cisalpine Republic, revised by Bonaparte in 1798.

5. Constitution of Roman Republic, sworn at Rome, March 20, 1798.

6. Constitution of the Parthenopæan Republic, 1799.

7. Constitution of the Italian Republic, of January 26, 1802. (10 Pluviôse, an X.), with Bonaparte as President.

8. Constitution of the Ligurian Republic, 1802.

9. Constitutional Statute of March 17, 1805, naming Napoleon I. king of Italy.

10. Constitutional Statute of March 27, 1805, concerning the regency and the great officials of the realm.

11. Constitutional Statute of June 5, 1805, revising the Italian constitution.

12. Constitutional Statute of December 20, 1807, again modifying the Italian constitution.

13. Constitutional Statute of the Kingdom of Naples and Sicily, of 1808, given by Napoleon.

14. Constitution of Sicily, 1812, given by the Bourbons under the influence of England.

15. Constitution of the Lombard-Venetian Kingdom, April 24, 1815.

of the temporal government, approved by Pius IX., March 14, 1848; that of the kingdom of Sicily (July 10, 1848); and the constitution of the short-lived Roman Republic (February 9, 1849).

If the old states, the course of whose public law had not been broken, felt the need of bearing witness, through written documents, to its liberal evolution, all the more strongly must the new states of Europe, which had arisen under the influence of the same general ideas, feel the necessity of giving a positive expression to their public liberties.

The first work of the National Assembly, which was convened by Hypsilanti, and which proclaimed, in 1822, the independence of Greece, was to adopt the *Provisional Statute of Epidaurus*.[1] Soon suspended by war and the numberless obstacles which for years hindered the realization of the wishes of the patriots, this statute was replaced by the constitution of Troezen (May 17, 1827), and finally, in 1844, by the work of the Assembly of Athens, which furnished a constitutional basis to the government of Otho I. This also was revised, in 1864, after the election of King George.

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16. Constitution given to the Roman States, by Pope Pius VII., July 6, 1816, in 248 articles.

17. Constitution of the Kingdom of Naples, July 7, 1820.

18. Constitution of the Kingdom of the Two Sicilies, February 10, 1848, granted by Ferdinand II.

19. Statute of Tuscany, published February 15, 1848.

(According to Dareste, *Les Constitutions Modernes*, Paris, 1883, I. 548.)

[1] January 15, 1822. The text is given in Poelitz, *Die europäischen Verfassungen seit dem Jahre* 1789. 2d edition Leipsic, 1832, III. 514 seq. In the year 1821 three republican constitutions had sprung up upon Hellenic soil: the constitution of the West (Acarnania, Ætolia, and Epirus) adopted November 4, by the assembly of Missolonghi; the constitution of Salona (Phocis) for the East (November 16); and the constitution of the Peloponnesus (Argos, December 1).

When Belgium withdrew from the union with Holland, she adopted, in 1831, a constitution patterned after the charter to which Louis Philippe, King of the French, had just sworn allegiance.

With the exception of Montenegro, the provinces which have one after another fallen away from Turkey, have followed the example of the western nations: Roumania in 1866, Servia in 1869, Bulgaria in 1879.[1]

To complete the picture of the expansion of written constitutions, it may be said that this regime is now in operation in all the states of both North and South America, in the vigorous and numerous colonies of England which to-day enjoy home-rule (notably in Australia), in the Sandwich Islands, in one of the empires of the extreme East, Japan, and in the three independent African republics, Liberia, Transvaal, and the Republic of Orange.

Of the numerous states which have during this century codified their public law, not one has returned for more than a brief interval to the old system. From the very nature of the new principle flows the continuity of its expansion. When a nation has seen political institutions, adapted to its needs, defined by a fundamental law, this law cannot disappear without sooner or later being succeeded by another.

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[1] Servia, recognized as an autonomous principality in 1830, had a still-born charter in 1835.

CHAPTER VI.

THE NATURE OF WRITTEN CONSTITUTIONS.

A CAREFUL study of the origin of written constitutions reveals their essential principle, not only in the revolutions of the eighteenth century, in America and France, but in the Reformation of the sixteenth and seventeenth centuries, that revolution which prepared the way for those which followed. We have seen how constitutions of this class are connected historically with the church *covenants* of the Puritan congregations of Old and New England, which are themselves the most striking manifestation of the complete overthrow of the old ecclesiastical hierarchy and the transfer of supreme authority to the body of the faithful. From this point of view they may be said to have grown out of the idea of individual sovereignty, an idea proclaimed by the Reformation in the double formula, — free inquiry, and universal priesthood, — and realized in politics by modern democracy. Thus there is no difficulty in explaining their simultaneous appearance.

The typical written constitution, as conceived by those who adopted it as the basis of the modern state, is democratic, the expression of the sovereign will of the nation. The nation appeared to these statesmen as the organic whole, of which the individuals living within a certain territory were the parts. They drew a sharp line of distinction between the state and the political powers which are its organs. The latter were then carefully

separated from each other and rendered subordinate to the former. Those nations which have attempted to borrow the work of these founders without admitting their conceptions, have encountered difficulties in what constitutes the very essence of the work itself.

In order to rightly understand the constitutional forms bequeathed us by the Revolution, we must look at them from the standpoint of the men of 1776 and 1789. This does not exclude from consideration all monarchical forms of government; but it assumes the recognition and definite adoption of the principle of popular sovereignty.

Thomas Paine said that a constitution does not exist as long as it cannot be carried in the pocket, meaning that a constitution must be written. Joseph de Maistre accused him of having made Frenchmen believe that a constitution is an intellectual production, like an ode or a tragedy, and concluded ironically: "The eighteenth century which suspected nothing, doubted nothing, which is indeed the rule." De Maistre did not understand Paine, and Paine would not have understood De Maistre. The meaning which they both gave to the same words was different.

The Catholic publicist held that a constitution was a divine work, which man could not elaborate. The treatise which he devoted to this subject was the development of the following propositions: —

I. The roots of political constitutions exist before all written laws.

II. A constitutional law is only and can only be the development or the sanction of a pre-existing unwritten law.

III. That which is most essential, most intrinsically constitutional and really fundamental, is never written, nor can it be.

IV. The weakness and fragility of a written constitution vary directly as the number of its articles.

These theses contain a great truth and a gross error: the truth, namely, that a constitution cannot be improvised, that every supreme law worthy of the name proceeds from a pre-existing public law; the error, namely, that there is any incompatibility between what is fundamental and what is written.

The aim of written constitutions is not to create forms of government out of nothing. It is to protect those which already exist, whether they be the result of a violent revolution or the product of a gradual evolution. In this sense, as Mackintosh said, "constitutions grow." He added: "they are not made." Why, then, have they been made, and why more than ever are they being made? Why is the English system to-day almost isolated in Europe, and why is the American and French system used by most of the peoples which are free or which aspire to be so?

Had Louis XVI. adopted resolutely and unreservedly the view of the National Assembly, granting, without contest, all it demanded of the monarchy; had he openly renounced all claims to absolute power, and had he governed as he promised to govern, he would have profited by a great outburst of popular gratitude. But the task of the Assembly had not been accomplished. France was restless and troubled. The future could be assured only by a formal constitution, a fundamental written law, and it was supremely important that this law be enacted by the people, not granted by the monarch.

When a people frames for itself a constitution, it formulates its public law, in its present form or with the changes which seem desirable, so as to render it a real safeguard

against all attempts to undermine popular liberties. Since in a monarchical state the sceptre is liable to fall into bad hands, protection must be sought against the executive power; in a republic it will rather be against the legislative. An advanced democracy will have to guard against its own excesses.

A written constitution is, then, essentially a law of political protection, a *law of guaranties:* guaranteeing the nation against the usurpations of the authorities to whom she necessarily confides the exercise of her sovereign power; guaranteeing also the minority against the omnipotence of the majority. Having secured this, it proceeds ordinarily to declare the rights of citizens, to determine exactly the organization of the different branches of the government and their relations to each other, and in many cases to make certain special provisions, rendered necessary by peculiar political conditions.

A constitution thus elaborated does not form the complete code of the constitutional law of a country. It is that part of it which has been especially approved by the sovereign, and which may serve in case of transgression as the basis of an appeal against the guilty authority. There exist, along with it, traditions and usages which may possess great importance as unwritten law. Thus, in the United States, no article in the Federal Constitution forbids the re-election of a president for the second time. And yet, since Washington made, in the interest of the public good, the sacrifice of the third presidency which he was strongly urged to accept, no one has dared present himself more than twice to the suffrage of the electors. The partisans of General Grant thought in 1880 that the popularity of the hero of the War of Secession would enable them to break this rule in his favour, but they were compelled to renounce the attempt in the face of

a pronounced public opinion. And it is now agreed that this test has been decisive. It is not difficult to cite similar examples even in the countries which cling most tenaciously to the principle of positive law. French courts have on several occasions based their decisions upon certain articles introduced into the public law of the state by constitutions that have now disappeared. For instance, Article 75 of the constitution of the Year VIII. provided that the agents of the government, other than the ministers, should not be prosecuted for deeds pertaining to the discharge of their functions, except by permission of the Council of State. The principle involved in this article was applied by the courts, under all administrations, down to 1870, when, since this rule had given very great dissatisfaction under the last reign, it was decreed, September 19, that "Article 75 of the constitution of the Year VIII. is repealed."

In a general way, it may be said that a constitution ought not to contain matters of detail. We may even agree with M. Jules Ferry that conciseness is essential to a good constitution,[1] provided we speak of form only. There must be no suppression of guaranties, no curtailment of matters of importance, out of mere love of brevity. The aim of a written charter being, above everything else, to give protection, the best is not that which is shortest, but that which protects most efficiently. This would seem to be evident. It is, however, sometimes forgotten in Europe, and it is not out of place to recall the fact.

The citizens of the United States have undergone more than once the costly experience of legislative misconduct. Of the three powers, it is the legislative which, in repre-

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[1] *Exposé des motifs du gouvernement touchant la révision de la constitution* (1884).

sentative democracies, is the most tempted to play the sovereign. It is the one whose misdeeds are most difficult of prevention and reparation. In order to defend themselves against their representatives in the legislatures, the Americans have first diminished their power by taking from them the election of magistrates, and by giving a suspensive veto to the popularly elected governor. Then, in consequence of new abuses, popular distrust has lessened the legislatures' field of activity by inserting in the constitutions numberless matters which figure in them only because they can thus be withdrawn from legislative control. The first constitution of Virginia, framed in 1776, consisted of four pages in quarto. In 1830 her second constitution had seven of the same form. In 1850 the third contained eighteen; and the present one, dating from 1870, numbers twenty-two. In 1776 the constitution of New Hampshire contained about six hundred words; that of Missouri, dating from 1875, has twenty-six thousand.[1]

These documents are certainly not distinguished by their brevity. Does this mean that the Americans are wrong? Not at all. They have sought a means of efficient self-protection against the corruption and intrigue which have too often dishonoured their legislatures. The constitution offered them this means; it was made, in fact, for that purpose. They have not diminished the grandeur of their constitutions by entrusting them with the care of matters which they feared would otherwise be mismanaged, however long the list of these may be. Nor have they, if Joseph de Maistre will allow us, rendered them weak and fragile. American constitutions are not less

[1] Cf. Bryce, *The American Commonwealth*, 2d ed., London, 1889, I. 438.

respected and obeyed to-day than they were a hundred years ago.

If there are countries where constitutions have lost something of their first importance, those countries are in Europe. German science, so powerful in the Old World, has abandoned, within the last generation, the doctrine of her great jurists of the early part of this century, and is gradually assimilating constitutional law with ordinary law. At the same time, France, for political reasons, has seen her written constitutional law reduced to the fewest possible provisions. From these coincidences there has resulted an undeniable diminution of the prestige attaching to the law of laws. It is to be hoped that this diminution is only temporary, for we are moving toward times when constitutions, solidly placed above parliaments and multitudes, will be more and more necessary.[1]

Democracy, it has been said, is more than a form of government; it is a state of society. It is a state toward which all contemporary nations are tending by a seemingly inevitable law of evolution. Some have already reached it, and are making for themselves and for others the difficult experiment of popular government. Others are marching toward it more or less rapidly. Finally, others are held back by the force of their mediæval traditions, or by their imperfect civilization, but all are fatally drawn on toward it by the conquests of science

[1] It may not perhaps be useless to say that a fundamental difference separates American constitutional jurisprudence from that which has grown up in Europe. While in France, and in the countries which have adopted the French system, the act, by which the legislative power might violate an article of the constitution, can only give rise to political redress, in the United States, the judicial power may decide upon the constitutionality of laws. The courts can thus declare of no effect the acts of legislatures. (See below, Part III. Book I. Ch. VIII.)

and industry, by the annihilation of space, by the diffusion of knowledge, by all that which constitutes modern progress. Now the democratic state is the one which most needs a strong written constitution. In a monarchy where *de jure* or *de facto* the prince possesses a personal power, minorities may find in him a protector. In a democracy the law, which is above the legislator himself, is their only safeguard against an usurping majority. A temporary safeguard, it is true, since in the last analysis the will of numbers must prevail; but still a safeguard, and of prime importance, because it prevents *surprises*, because it enables resistance to organize, and because it at least obliges the majority to measure the importance of its acts before accomplishing them.

Constitutions, in order to be protective, must be stable and beyond the reach of the legislature. Further, as being an expression of law which itself progresses under the action of the collective will, they must be capable of more or less easy modification, that thus the letter of the document may be kept in harmony with the spirit of the national institutions. Such is the object of the "amendments" in the American meaning of the word. It sometimes happens that those who are charged with the framing of them, anticipate more or less in their provisions the demands of public opinion, that changes are made in the written law before they have really taken place in the thought or usages of the country, before they have even been seriously demanded. Then, if these innovations are not ratified by public reason, which never abdicates its rights even in the face of the clearly expressed will of the masses, they are sooner or later removed.

This work of codification, this introduction of fundamental reforms, must necessarily be brought about in a

normal way, methodically. To assure this, there have been inserted in most modern constitutions what are called in France *clauses de révision.* These amendment clauses furnish a rapid though not the only means of determining the character of the processes of constitution-making in those countries where constitutions have been adopted. They form the principal subject of this study.

According to their origin and legal character contemporary written constitutions may be divided into two main categories: on the one hand *compacts* and *royal charters;* on the other, constitutions resting exclusively upon the principle of popular sovereignty.

This distinction is the basis of the classification adopted in this book.

II.

ROYAL CHARTERS AND CONSTITUTIONAL COMPACTS.

BOOK I.

THE GERMAN GROUP.

CHAPTER I.

CONSTITUTIONAL COMPACTS.

"THE act of framing a constitution is by its very nature reciprocal; it is an act between parties both of which alternately give and receive." [1] Such is the definition given by the jurist Klüber, who for thirty years, from 1807–1837, was the highest and most influential authority on this subject. He was the friend and confidant of Prince Hardenberg, the councillor of the German delegates at the Congress of Vienna, professor and diplomat at the same time. He had first made a special study of the public law of the Rhine Confederation and then, later, one of that of the German Confederation. He was thus abundantly qualified to pass judgment upon the constitutions of his time and country. These constitutions still remain as the fundamental law of most of the States of the Empire and, together with the charter to which Louis Philippe swore allegiance in 1830, have served more or less as models for all the sovereigns and all the assemblies which have founded new constitutional monarchies in Europe.

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[1] *Oeffentliches Recht des teutschen Bundes und der Bundesstaaten*, 4th edition, Frankfort, 1840, p. 406 (§ 283, Note *e*).

At the time of the Revolution the formula thus expressed by the Heidelberg professor was unknown. It is the most perfect statement of the system which had been created in the German Confederation by the very force of circumstances.

The necessity of a fundamental written law having been once recognized by the princes, their first idea was to grant it themselves, by virtue of their supreme authority. In this they would be following the example which Louis XVIII., the perfect type of the restored sovereign, had just set them. They immediately set about promulgating charters, but several of them had reckoned without their subjects, and the experience through which they went was a valuable object lesson to others. These subjects had learned much from the experience of the last twenty-five years, and not having lost all remembrance of their remoter past, they intended to secure the highest possible respect for what they thenceforth considered their rights. Charters which bore too plainly the marks of royal condescension were refused in the principality of Waldeck (1814), in Würtemberg (1815–1819), in electoral Hesse (1815 and 1816), then in the principality of Lippe-Detmold (1819), in the grand duchy of Hesse (1820), and still later, in the principality of Hohenzollern-Sigmaringen and in the kingdom of Hanover (1833).

What was to be done in the face of these repeated manifestations of the spirit of the age? Under no conditions would those in authority adopt the plan of constitutions established by an act of the nation itself. Moreover, the most advanced radicals did not dream of such a plan. Such had been the enemy's system. What those who refused the royal charter demanded was an agreement between the sovereign and the assembly of estates upon the text of a constitution. The feudal period furnished

more than one example of such compacts with reigning houses. Men were led back to them by circumstances.

Nowadays, when German jurists speak of sovereignty, they either declare that it belongs neither to the people nor to the prince, but that the State, considered as indivisible, is the wielder (*sujet*) of it, — which, as they teach in France,[1] is a shifting of the question, for the point at issue is not to determine who is the *wielder*, but who is the *source* of sovereignty, — or they identify sovereignty with *force*, and ascribe it to the monarch, considering the houses which share the legislative power with him not as assemblies to which the people have granted the task of controlling the government, but as councils which the prince has deemed wise to join to himself to aid him in the exercise of his prerogative.

From a legal and philosophical point of view it is possible to defend these theories which have been thus worked out and formulated with undeniable talent and learning. It is plain, however, that this would be impossible, from an historical point of view, even in reference to the country which has given them birth. The best proof of this is in the testimony of Klüber, who knew better than any one else exactly how the States of Germany have taken on their present form. This author enumerates as having the character of a contract, even with respect to the texts themselves: the constitutional charters of the Netherlands (1815),[2] the grand duchy of Saxe-Weimar-Eisenach, the principality of Waldeck, the free city of Frankfort (1816), the duchy of Saxe-Hildburghausen (1818), Würtemberg (1819), Brunswick (1820 and 1832), the duchy of Saxe-Meiningen (1829), electoral Hesse, the duchy of Saxe-Altenburg, the kingdom of

[1] Professor Larnaude, in his lectures at the Paris Law School.

[2] In force, in Luxemburg, down to 1841.

Saxony (1831), the principalities of Hohenzollern-Sigmaringen (1833) and Lippe (1836).

It may be admitted that, since the State forms an organic unity, constitutions are supreme laws, emanating from indivisible sovereignty, and that there ought not to be compacts of this character between princes and peoples, but it cannot be denied that there have been such. They furnished the only means of conciliating past law, which men did not wish to renounce, and present law which they wished to maintain. From this compromise were born most of the constitutional kingdoms of Europe.

CHAPTER II.

THE CHARTER OF SAXE-WEIMAR AND THE CONSTITUTION OF WÜRTEMBERG.

THE charter of the grand duchy of Saxe-Weimar (May 5, 1816) served as model for most of those of the smaller States of the German Confederation. It was signed by Charles August, the patron and friend of Goethe and Schiller. The Duke himself had announced it on several occasions as "A constitution which shall be the supreme law of the grand duchy and shall constitute a fundamental compact between the prince and his subjects."[1]

The States-General were convoked to unite with a Government Committee in preparing the draft. Their plan was submitted to the sovereign, who promulgated it, though not without having first modified certain details. "Only through our approval," Charles August had said in the edict convoking the assembly, "will the plan acquire validity and become the fundamental law of our grand duchy" (Art. 50.) Article 123 was thus conceived: —

"No change shall be made in the fundamental law of the grand duchy of Saxe-Weimar-Eisenach and in the constitution thereby established, upon any point whatsoever, either directly or indirectly, either by repeal or by

[1] Letters patent of November 15, 1815, and January 24, 1816. Edict of January 30, 1816, § 49.

additional enactment, without the consent of the prince and the Estates."

The character of a compact is clearly indicated in the constitution as well as in the documents which preceded it. However, it is also evident that in the compact thus formed, the contracting parties do not stand upon an equal footing. The authority of the prince predominates.

The Würtemberg constitution of September 25, 1819, still in force, furnishes us the opposite type. Swabia, which was destined to constitute, in 1805, the nucleus of a kingdom, had enjoyed, ever since the Middle Ages, first as county, then as duchy, such extensive liberties, that Fox was led to compare them to those of England.[1] These liberties had been assured to the representatives of the clergy, nobility, and boroughs by a series of compacts, made with the reigning house. The Estates of the country had gradually risen in opposition to the movement, regarding it as a power which they had not created, and by which they were counterbalanced. This power disappeared during the ten years of absolute government which followed the overthrow of the old regime, the territorial enlargement, and the transformation of the duchy into a kingdom, under Napoleon's protectorate. But it was not broken. If King Frederic entertained the chimerical idea of getting completely rid of it by means of the Revolution itself, he was destined to be soon disillusioned, for, on his return from the Congress of Vienna, desiring to grant his subjects a constitution according to his own taste, the gift was bluntly refused by the assembly of Estates. This was the beginning of a conflict which lasted down to 1819, and which was

[1] "There are but two countries of Europe that possess constitutions, England and Würtemberg." See *Edinburgh Review*, LVIII. 165, 168.

only ended by a return to the plan of a compact with the frank recognition of the equality of the parties. The constitution which was adopted by both sides, on September 25, had been wrought out by a mixed committee consisting of seven deputies from the assembly and four royal commissioners. William I., who had just acceded to the throne, announced its ratification in the following terms: "The fundamental law of the monarchy flows from a free agreement with the Estates of the realm; it is the fairest monument to the harmony which exists between the king and his people. The constitution of the kingdom has received my signature and that of all the members of the assembly of Estates, summoned to frame this important work. The Estates, sitting together as a single body, have heard me make orally the solemn promise to maintain the integrity of the constitutional compact."[1]

This document contains no amendment clause. A royal charter, or a constitutional compact, is an act which is perfect once for all, hence logically enough, it makes no provision for future amendments. Such were the charters of Louis XVIII. and Louis Philippe. It may be assumed that if the need of a change makes itself subsequently felt in the first class of constitutions, — namely, those graciously conceded by the king, — the king will himself give heed and adopt that procedure which shall seem to him most appropriate to the circumstances; that if the need arise in the case of constitutions of the second class, — namely, compacts, — the contracting parties may agree upon a new convention, replacing or supplementing the first.

[1] Manifesto, Sept. 2, 1819. Compare the passage of the preamble of the constitution, where the king speaks of his desire to see the establishment of a constitution resting upon a compact, and how it was brought about.

We have seen that the charter of Saxe-Weimar ordained in Art. 123 that no change should be made in the fundamental law of the grand duchy, without the consent of the prince and the Estates of the land. This provision is found at the beginning of the sixth and last chapter, entitled "On guaranteeing the constitution." It requires the prince as well as all state officials before taking office, to bind themselves solemnly to respect the principles of the fundamental law, and declares every act attempting its secret violation or violent overthrow to be a crime of high treason. The best commentary upon this article is given by the concluding provision of the charter of the neighbouring principality of Waldeck-Pyrmont, which was approved by the prince, April 19, 1816, while the assembly convoked by Charles August was in session at Weimar.

"This constitutional compact, which we hope will be recognized as sufficiently liberal, and from which neither we nor our successors desire or ought to deviate in the slightest degree, without the consent of our faithful Estates, has been duly concluded on both sides. Our government is charged with its promulgation."

The object of Art. 123 of the constitution of Saxe-Weimar, introduced word for word into those of Saxe-Hildburghausen (1818), Saxe-Coburg (1821), Saxe-Meiningen (1824 and 1829), and Saxe-Altenburg (1831),[1] is not to establish in advance a process of revision, but, on the contrary, to insure the constitution against every attempt at modification, by any other way than the one followed in its establishment. It was thought necessary

[1] See likewise the plan of the constitution of Schwarzburg-Sonderhausen (1830) and Hohenzollern-Sigmaringen (1832).

to remind the sovereign in this way of the character of the concessions he had made and of the impossibility of his modifying them in the future on his own authority. Initiative in legislation belonging to him alone, no attention was paid to the other part.

CHAPTER III.

AMENDMENT CLAUSES IN THE CONSTITUTIONS OF LUXEMBURG, BAVARIA, SAXONY, ELECTORAL HESSE, ETC.

THE constitution in force in Luxemburg, a country which the Vienna Congress joined to the German Confederation, was the first of the charters of that period to contain a chapter expressly relating to future amendments. This was the constitution of the Netherlands, whose authors, though they did not adopt the democratic principles of the Revolution, had however had in mind the ninth title of the statute of the Batavian Republic: "Concerning the political action of the people in reference to the constitution," and the supplementary regulation "Concerning the mode of constitutional revision."

Chapter XI. of the charter of Holland, dated August 24, 1815, is thus conceived: —

"*Concerning Modifications and Additions.*"

Art. 229. "When experience shall show the necessity of constitutional amendment, an act of the legislature shall declare this necessity, and shall specify the amendments."

Art. 230. "This act shall be sent to the Provincial States, which shall then send to the States-General within the time therein specified, and after an election held in the usual way, a number of deputies extraordinary, equal to the number of ordinary members."

Art. 232. "The second chamber of the States-General shall make no decision concerning an amendment or an

addition to the constitution except two-thirds of its members be present. A three-fourths majority of the votes cast shall be required for adoption.

"All the rules established for the enactment of laws shall be scrupulously observed."

Art. 233. "No modification in the fundamental law or in the order of succession to the throne may be considered during a regency."

Art. 234. "All alterations of and additions to the constitution shall be appended to it and solemnly promulgated."

The constitution of the new realm of the house of Orange-Nassau was one of the most liberal of its day. It granted to the second chamber of the States-General the initiative in legislation, and also by Articles 229 and 230, the same right in constitutional revision. As has been shown, this revision might take place at any time, without dilatory formalities, and the country was consulted through the special duplication of the provincial delegations in the States-General. The provision that in the second chamber of the legislature two-thirds of the members should constitute a quorum, and that a three-fourths majority of the votes cast should be required for adoption, seems to have been suggested in part by the provision of the Norwegian constitution of 1814, which required a two-thirds majority in the Storthing.[1] The clause prescribing a special majority was made still more restrictive because of the greater latitude given, on the other hand, to the constituents.

These provisions were adopted by the Bavarian legislators of 1818, and combined by them with those of the charter of Saxe-Weimar in these terms: —

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[1] See below, Chap. V.

"Alterations in the text of the constitution, or additions to it, shall not be made without the consent of the Estates."

"Propositions of this character shall proceed solely from the King. Only when he shall have presented them to the Estates, may they deliberate upon them."

"That decisions upon questions of so great importance may be valid, a quorum in each house of three-fourths of the members, and a two-thirds majority vote shall be required."

This is Art. 7 of the tenth title of the Bavarian statute. It is called, in the king's declaration, which serves as a preamble to the charter, "A guaranty of the constitution, securing the future against arbitrary changes, without preventing progress, without barring the way to improvements demanded by experience."

Thus without positively establishing affirmatively a mode of constitutional revision, Bavaria nevertheless entered in this respect also upon the path broken by the Revolution. The year 1848 was destined to carry her still further along in it. An amendment, dated June 4, gave the chambers a right of initiative, restricted to the revision of titles IV., VII., VIII., and X., concerning the rights and duties of the individual, the privileges of Parliament, the judicial power, and constitutional guaranties.[1]

The provisions of the above article were reproduced, in 1831, in the constitution of Saxony, with the difference that the right to propose to the king alterations in the compact, was bestowed directly upon the Estates, with no other restriction than that they should be discussed twice, in two consecutive assemblies.[2]

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[1] *Gesetz, die ständische Initiative betreffend*, of June 4, 1848, Art. 2.

[2] Art. 152. The plan of government, dated March 1, 1831, adopted

The mode of repeated deliberation in successive assemblies, formerly inaugurated in Europe by the first French constitution, had just been brought again into notice, in Electoral Hesse, by the charter of January 5, 1831.

"For the adoption of modifications to the present constitution there shall be required either the unanimous vote of the actual members of the Landtag, or a three-fourths majority of the votes cast in two successive assemblies."[1]

Down to the time when Prussia finally received the constitution which had been so often promised her and so long delayed, those States of the German Confederation which enacted legislation of this character, adopted one or the other of the above rules.[2]

That the charters bore the character of a compact was never questioned by the assemblies. But the evasions of the rulers were feared, and the desire of preventing the Prince from ever recovering his former power, led to the

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the system of the Bavarian constitution purely and simply. See *Entwurf der Verfassungsurkunde des Königreichs Sachsen, vom* 1. *März*, 1831, *den Versammelten Ständen Vorgelegt*, § 144.

[1] Art. 153. — Art. 97. The Estates may formulate propositions tending to the creation of new laws, as well as to the modification or abrogation of existing provisions.

[2] Cf. constitution of the grand duchy of Baden, August 22, 1818, § 64 (two-thirds majority). Constitution of Hesse-Darmstadt, December 17, 1820, Art. 110. Plan of a constitution for Hanover, November 15, 1831 (quorum of three-fourths, two-thirds majority, two decrees of the successive Landtags necessary, to propose an amendment to the king). Constitution of August 6, 1840, Art. 180 (a three-fourths quorum, an unanimous vote of the Landtag, or a two-thirds majority of two successive assemblies required for the exercise of the right of initiative in constitutional reform). Constitution of the principality of Schwarzburg-Sondershausen, September 24, 1841, Art. 208.

express stipulation that no alteration should be made in the constitution without the consent of the nation's representatives. Further, as a simple or single majority might be too easily won over to the views of the sovereign, exceptional guaranties soon seemed necessary; such as the consultation of two successive assemblies, extraordinary quorums, special majorities. These provisions, which aimed in America and France to ward off the danger of parliamentary excesses, became, in Germany, a precaution against the reactionary attempts of the crown advisers.

CHAPTER IV.

THE CONSTITUTIONS OF PRUSSIA AND THE GERMAN EMPIRE.

WHEN in 1848 the King of Prussia, Frederick William IV., yielding to the pressure of circumstances, convoked at Berlin a national assembly, chosen by universal suffrage, and presented it with a constitution, the draft contained, as was customary, restrictions as to future amendments: a quorum consisting of at least half the members of both houses and a two-thirds majority of the votes cast.[1]

The parliamentary committee, charged with the examination of the compact which the sovereign proposed to conclude with his people, accepted the article, but the assembly was not allowed to deliberate upon it. That body gave offence to the prince and his ministers by considering itself a constituent assembly and by preparing a complete constitutional scheme which it seemed desirous to put into force.[2] On November 9, under the pretext that it was being influenced by the threats of insurrection in the capital, the assembly was prorogued, with orders to remove to Brandenburg. A few weeks later, on December 5, it was dissolved.

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[1] Plan of May 20, 1848.

[2] The official title of the assembly was: "*Versammlung zur Vereinbarung der preussischen Verfassung.*" Letters Patent, May 13, 1848.

Simultaneously with the edict of dissolution, there appeared a charter which Frederick William granted to his subjects, "considering the extraordinary circumstances which had rendered the hoped-for agreement impossible." The shock was severe for a people who had been solemnly promised "a constitution to be established upon a broad basis, agreed upon with an assembly of the nation's representatives freely chosen and invested with full powers."[1]

Frederick William IV. was too high-minded to think of violating in any way his royal promise. But a way of keeping it had been suggested to him which seemed compatible with the maintenance of his prerogative; namely, that the provision should be added to the charter that, as soon as the chambers had met, it should be submitted "to a legislative revision." In conformity with this declaration, the article intended, in the first plan, to hedge in the amendment of the constitution with restrictive conditions, was abandoned and replaced by an article (107) which provided that this act might be amended by the ordinary processes of legislation.

Thus the old system fell and, instead of negative provisions in regard to amendment, a positive procedure was established. Unfortunately this was accomplished at the expense of the distinction between constitutional law and ordinary law. This innovation or, more accurately, this retrogression of Prussian public law, was destined to exercise a considerable influence upon the thought of future German jurists and, through the authority of their teachings and writings, upon contemporary European science. The measure, as has been shown, was due to the very peculiar circumstances of an unusual political situation.

The electoral law under which the new assembly was

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[1] Decree of April 2, 1848.

chosen, though less liberal than that under which the election of the old had taken place, had, true to the promise of a "national legislature freely chosen," respected the two chief conquests of 1848,— universal suffrage (in the second degree), and the secret ballot. It was still too early for a hearty understanding between the *Landtag* and the government councils. Even before the chambers had received the reports of their committees upon the work of revision delegated to them, there appeared a decree proroguing the one and dissolving the other (April 27, 1849). The lower house had appeared revolutionary, by its support of the plan for a German constitution wrought out by the Frankfort Parliament and by its demand for the cessation of the state of siege which was then weighing heavily upon Berlin. The report of the ministry to the king proceeded to say: "The decrees of the second chamber are based, in most cases, upon ballots in which only a few votes turn the balance — which proves conclusively that the result is most often the work of pure chance. It would be dangerous to abandon to such risks the revision of the constitution and the elaboration of the organic laws connected with it."[1]

A national assembly, in which the unforeseen played a less important rôle, was chosen under a third electoral law, by which the secret ballot and the right of equal suffrage were suppressed. This time the oracle replied to Philip as Philip would have it reply. The Landtag, assembled in August 7, 1849, united with the government in revising the constitution, and the king was enabled to promulgate the new document, January 31, 1850, as the result of an agreement between himself and the two houses.[2]

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[1] Report of April 27, 1849.

[2] "*In Uebereinstimmung mit beiden Kammern endgültig festgestellt.*" Preamble of the Prussian constitution.

In the course of the deliberation the second chamber had demanded a return to the system of special guarantees as to future revisions and an appeal to the country by means of a dissolution, in case a proposition of this kind should not obtain a two-thirds vote in each house, the quorum consisting of at least half of the legal number of members. The first chamber maintained the provision of Art. 107 as it was, adding simply the condition of a double vote separated by an interval of twenty-one days. "It acted thus," says the report of its committee, "because of the present conjuncture, and because the constitutional system would demand a further development upon lines revealed by experience."[1] The second chamber adopted this decision, and the article was given this wording: "The constitution may be altered by ordinary legislative enactment. For such alterations a majority vote of each house, expressed in two successive ballots, separated by an interval of twenty-one days, shall suffice."[2]

Such was the final statement of the most detailed provision of a charter of which Frederick William IV. himself said that it was the product of the moment, and bore the unmistakable mark of its origin.[3]

Revision by simple legislative enactment was adopted into the constitution of Saxe-Coburg, in 1852. In 1866, it was embodied in the Federal Compact of the North German Confederation with the single reservation of a special majority in the *Bundesrath*,[4] and finally, in 1871,

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[1] See von Rönne, *Das Staatsrecht der preussichen Monarchie.* Leipzig, 1882, II. 366, Note 3*a*.

[2] Prussian constitution, Art. 107.

[3] Speech, February 2, 1850, before the houses united to take the oath.

[4] "Amendments of the constitution shall be made by legislative enactment. But a two-thirds majority shall be required in the Federal Council" (Art. 78).

was placed in the constitution of the German Empire, in these terms: —

Art. 78. "Amendments to the constitution shall be made by legislative enactment. They shall be considered as rejected when fourteen votes are cast against them in the Federal Council."

"The provision of the constitution of the Empire by which certain rights are secured to particular States of the Union in their relation to the whole shall only be modified with the consent of the States affected."

The power, given to fourteen votes, to check all constitutional laws in the Federal Council—which gives Prussia, entitled to seventeen votes, an absolute veto—and, in the case of an amendment intended to modify the relation of a particular state toward the nation as a whole, the necessity of gaining the consent of the interested party are two expedients which shows plainly the federal character of the German Empire, and the anxiety of its founders to assure forever the hegemony to Prussia.

CHAPTER V.

THE LOGICAL OUTCOME OF THE PRUSSIAN SYSTEM.

It may be maintained that the application of ordinary legislative procedure to the work of revision, with the excellent intention of giving to the text all the perfectibility of which it is capable, does not necessarily imply the identification of constitutional law and of organic law. In theory, this is true. Notice, however, the result.

Thirty years ago Robert von Mohl, who was then the prince of Germany's publicists and one of the foremost of her jurists, wrote as follows: —

"It is almost inconceivable that any one can maintain the legal affinity between the constitutional laws of our day and ordinary laws, and question the greater importance of the former, so clear are the teachings of history, so explicit are the declarations of the documents themselves. And yet reactionary sophistry has dared attack even this principle; such is, in fact, the task which H. Bischop has undertaken in the *Deutsche Vierteljahrschrift* (III. 166 seq.). This young writer pretends that to recognize an essential difference between constitutional law and ordinary law is to put oneself into direct contradiction with the monarchical principle. Such a differentiation, says he, can only rest upon that of the authority whence proceed the two kinds of law, and that theory is an odious product of the Revolution which asserts that the constitution emanates solely from the sovereign people,

and consequently must be respected by every succeeding law.

"Now it is notoriously false that constitutions are regarded and treated as laws of a superior order because men see in them the emanation of popular sovereignty. They are recognized as such because competent legislative authority has clothed them with this attribute. The question is not what was this authority, but simply had it the right to make this declaration? A royal charter is considered the supreme, unquestioned law of the country if the monarch, at the moment of its presentation, was indisputably the absolute master of legislation. On the other hand, it is difficult to see how the authority of a prince would be incompatible with the existence of positive rules whose modification is rendered difficult, and which cannot be overturned by ordinary legislation. Only when one identifies monarchy with absolute government, with exemption from loyalty to promises, and with the denial of any rights to the citizens, can one advocate theories like these. Finally, this method, too often resorted to, which consists in rejecting as revolutionary, every troublesome theory, and in throwing suspicion upon those who defend them, yet not refuting them, deserves to be severely condemned in the name of science and good faith."

Elsewhere [1] the same author seeks to establish the following propositions: —

"The will of the legislator being supreme in the state, the binding force of the rules laid down by him does not depend upon their content. From this point of view the law must be all-powerful, and the contradiction that might exist between it and the constitution must be qualified as

[1] *Ministeriale Verantwortlichkeit und Staatsgerichtshöfe in Deutschland*, Giessen, 1859, p. 41 seq.

apparent only, for the reason, that the legislator is himself competent to determine the notion of constitutionality.

"It is clear, however, that the will of the legislator is not the supreme will in the state. If the validity of his decrees is limited in law in such a way that it depends upon the fulfilment of certain conditions, these must be fulfilled, else the standard thus set up does not have the force of law. Now, such a limitation results from the obligation of strict conformity to the constitutional rule, in acts of ordinary legislation. In the second place, as to the right of the legislator himself to determine the question of constitutionality, or, to speak more clearly, to declare that a standard which he fixes is a constitutional law, such a right exists in fact, but is dependent upon the discharge of certain formalities. These, needless to say, are not discharged in an ordinary act of legislation. This cannot then be accepted as a constitutional law capable of modifying the provisions of the constitution.

"These truths are so elementary for a logician and a jurist that one almost hesitates to recall them."[1]

Such was the utterance of Mohl in 1859. To-day, the doctrine, whose appearance he signalled in the pages of the *Deutsche Vierteljahrschrift*, and for which he so vigorously attacked the young contributor to that review, is in the process of becoming, if it has not already become, the doctrine of German science. One of the foremost masters of this school, and also not one of the least liberal, a jurist whose work very justly is appreciated far beyond the limits of the Empire, Professor Laband, teaches the following: —

"There is no will in the State superior to that of the sovereign, and it is from this will that both the constitu-

[1] *Staatsrecht, Völkerrecht und Politik*, Tübingen, 1862, I. 83, Note 1.

tion and laws draw their binding force. The constitution is not a mystical power hovering above the State; but, like every other law, it is an act of its will, subject accordingly to the consequences of changes in the latter. A document may, it is true, prescribe that the constitution may not be altered indirectly (that is to say, by laws affecting its content), that it may be altered only directly, by laws modifying the text itself. But when such a restriction is not established by positive rule, it cannot be derived by implication from the legal character of the constitution and from an essential difference between the constitution and ordinary laws. The doctrine that individual laws ought always to be in harmony with the constitution, and that they must not be incompatible with it, is simply a postulate of legislative practice. It is not a legal axiom. Although it appears desirable that the system of public and private laws established by statute shall not be in contradiction with the text of the constitution, the existence of such a contradiction is possible in fact and admissible in law just as a divergence between the penal, commercial, or civil code and a subsequent special law, is possible."[1]

Applying these principles to the constitution of the German Empire, Laband maintains that, since Art. 78 places no other conditions upon the work of amendment than the obligation to follow ordinary legislative procedure and to respect in the last instance the veto of the fourteen votes in the Federal Council, it may be altered indirectly by the enactment of a special law.

Examples of the constitutional practice of the Empire justify this reasoning, and the reasoning justifies these examples. On several occasions the constitution has been

[1] *Das Staatsrecht des deutschen Reichs*, 2d edition, Freiburg in Breisgau, 1888, I. 546.

modified by special laws without a change of any sort in its text, and in one of these cases the size of the minority vote in the Federal Council would have been sufficient to defeat the bill, had the vote been subjected to the condition established by Art. 78. This is a distinct imitation of Prussian usages. The constitution of 1848 and 1850 has often been modified in a similar way, by this or that provision of an ordinary law.

It is well known that Laband, and, following him, Zorn, Rosin, Gareis, Seligmann, Pröbst, and at present Seydel and Jellinek, hold that the determination of the content of a law (*Gesetzesinhalt*), which is made by the assembly, is strictly differentiated from the declaration which renders it executory (*Gesetzbefehl*), and which, even in a constitutional monarchy, belongs exclusively to the prince. This declaration is the essence of the law. "The sovereignty of the State" — such are the words of the eminent Strassburg professor — "does not enter into the determination of the content of law, but only into the sanction which gives to the law its value. The sanction alone is an act of legislation, in the legal sense of the word."[1]

In Prussia the sanction and promulgation of laws belongs to the king. As to the Empire, Laband interprets the Federal compact to mean that sanction is reserved to the Federal Council alone. The Emperor has only the rights of promulgation and publication. The result of this theory, so rigorously juridic, and of the principle stated above, is that, in the monarchy of the Hohenzollern and in the Federal State, over whose destinies she presides, the modification of the constitution depends upon an act of what a partisan of the separation of powers would call the executive.

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[1] Laband, I., 517.

CHAPTER VI.

THE REVISED CONSTITUTIONS OF SAXE-WEIMAR AND OLDENBURG.—THE CONSTITUTIONS OF THE FREE CITIES, LÜBECK, HAMBURG, AND BREMEN.

SIDE by side with the Prussian system of revision by legislative enactment, to which the foundation of the Empire has given the pre-eminence, there exists in most of the States of Germany, as we have already seen, another system springing from the very origin itself of their constitutions, which were established under the form of compacts, by men haunted by the fear lest these compacts might some day be treated as mere transient playthings. It is a kind of guarantee of the constitution against changes and surprises rather than a positive system of revision properly so called. But it has the advantage over the other, of preserving the majesty of the supreme law, maintaining it above the acts of ordinary legislation, in the place it ought to hold in a constitutional state which desires to be worthy of its name.

This consideration had already impressed those who revised the charters of Saxe-Weimar and Oldenburg, in 1850 and 1852, and had prevented their following completely the example of Prussia. The revised constitution of the grand duchy of Saxe-Weimar provides for the alteration of its articles by ordinary laws. But the special conditions by which the enactment of these laws is guarded

show that the application pure and simple of the Prussian formula encountered opposition.[1]

In the grand duchy of Oldenburg a distinction was made between certain enumerated provisions, of secondary importance, which may be altered by simple legislative enactment, and the remainder of the constitution in regard to which amendments can only be proposed or permitted (*beantragt oder zugestanden*) in two successive Landtags between which a general election shall be held. At least three-fourths of the deputies must take part in the vote.[2]

The triumph of Bismarck's policy tended naturally to increase the prestige of the Prussian system among the confederated States. Nevertheless, after the first years of effervescence and enthusiasm which followed the founding of the Empire, some attempts at resistance may be noted. Although the revised constitution of 1875 of the free city of Lübeck simply required for amendments, as in the case of any legislative act whatever, an agreement of the Senate and the representative assembly of the Burgesses,[3] the free cities of Hamburg and Bremen in 1879 and in 1882 both established special systems of revision. The constitution of Hamburg, which may be compared in this respect with that of Saxe-Weimar, while adopting the general legislative procedure, requires two deliberations twenty-one days apart, a quorum consisting of two-thirds of the members of the assembly of the Burgesses, and for both votes a three-fourths majority of the members

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[1] *Revidirtes Grundgesetz über die Verfassung des Grossherzogthums Sachsen-Weimar-Eisenach*, vom 15. October 1850, Art. 64.

[2] *Revidirtes Staatsgrundgesetz für das Grossherzogthum Oldenburg*, vom 22. November 1825, Art. 212.

[3] *Verfassung der freien und Hansestadt Lübeck*, vom 5. April 1875, Art. 50.

present.[1] Article 67 of the constitution of Bremen, put into its present form in 1882, follows almost word for word the same method of legislative procedure. In order to define carefully the special character of constitutional revision, this article determines the smallest details of the numerous deliberations to which it gives rise.[2]

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[1] *Verfassung der freien und Hansestadt Hamburg* (October 13, 1879), Art. 101. "For a provision modifying the constitution are required:

(*a*) "A decree passed by ordinary legislative procedure and adopted in the assembly of the Burgesses by a three-fourths majority of the members present, these constituting a quorum of three-fourths of the entire membership.

(*b*) "The confirmation of this decree by a similar majority, the quorum remaining the same, not earlier than twenty-one days after its adoption by the Burgesses.

"In case the number of those in favor of the decree is less than three-fourths of the members present and constituting the required quorum, the decree shall have no force. The plan in question shall be considered as rejected."

These provisions were developed in 1881 by an ordinance of the assembly of the Burgesses. This ordinance provides for presentation by fifteen members, a double deliberation, and a two-thirds majority in the first debate for the preliminary adoption, by the assembly, of a proposed amendment. Only after this does it come within the constituent initiative of the assembly.

[2] *Verfassung der freien Hansestadt Bremen* (November 17, 1875, 1878, 1879, and 1882), Art. 67. "Amendments to the constitution shall be made only through a strict observance of the special forms herein prescribed, for the deliberations and decisions of the Senate and the assembly of the Burgesses.

(*a*) "The proposition shall not be made an order of the day in the house of Burgesses except it emanates from the Senate or has been presented by at least thirty deputies, conformably to the ordinance and in writing. The Burgesses shall deliberate upon this proposition, twice, in two distinct sessions. In each of these deliberations, amendments may be proposed in the ordinary form provided they are supported by thirty representatives. After the closure of the second debate the Burgesses shall decide whether they will take into further consideration and relegate to further deliberations the proposition and amendments which they may have received.

(*b*) "If the Senate shall accede to this decision, a committee shall be

The governments of the free cities of the Empire still show a mixture of aristocratic and democratic elements, in which the latter, under a restricted form of representation, progress and tend to dominate. This evolution has so far advanced that their constitutions no longer retain the character which Klüber noted in that of Frankfort. They are no longer, properly speaking, compacts between different classes of citizens, but have already become fundamental statutes, the creation of councils chosen by the community and serving as its organs.

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appointed to draw up a report. This committee may propose amendments to the plan which has been submitted to it.

(*c*) "After the committee has made its report, the discussion shall be resumed and a decree shall be definitively passed. On this occasion amendments to the first plan or to the plan of the committee may be proposed, either in the Senate, or in the assembly of the Burgesses. A majority of the legal number of members shall be required for the adoption of these amendments. Further, when the proposition shall be made in the assembly of the Burgesses, it must be supported by thirty representatives.

(*d*) "An amendment to the Constitution shall only be considered adopted if, after observance of the provisions contained in §§ (*a*), (*b*), (*c*), it has received, in two distinct sessions of the Senate, a majority of the legal number of its members, and, in two distinct sessions of the Burgesses, the majority of the legal number of its representatives.

(*e*) "The present law shall take effect as soon as promulgated." — *Constitutional Law*, November 8, 1882.

CHAPTER VII.

THE CONSTITUTION FRAMED IN 1848–49 BY THE "FRANKFORT PARLIAMENT."

In private law a contract is binding upon individuals only because it is so ordained by statute. Likewise in public law it is impossible to invest a contract with a legal character save by the intervention of a sovereign will from whose sanction it receives its binding force. It is for this reason that jurists call the compacts of international law imperfect.

What is the sovereign will which has given constitutional authority to the fundamental compacts which exist in most of the States of Germany? Few of the documents have mentioned it, because silence was the very condition of their existence and of the agreement between the interested parties. Thus the commentators have been given free play, and their replies have been as varied as they possibly could have been. The question of sovereignty, thus left open, has been decided, now in favour of the prince, now in favour of the people, according to the time, the men, and the circumstances. During the present century, Germany, which has remained monarchical from the beginning to the end, has shown as great a diversity of opinion upon this point as has France, which has experienced, during the same period, all the different regimes. To-day German science declares authoritatively for the prince, whose will it considers the highest in the State,

which latter is itself sovereign. In 1848, with no less authority, and with an enthusiasm which swept the nation along with it, it declared for the people.

It will not be devoid of interest, after having shown the principles which prevail at present in the councils of the Prussian monarchy and of the Empire founded by it, to recall those laid down by the constitution-makers of Frankfort, the patriots who first tried to revive the imperial dignity in Germany, and to make it hereditary in the line of the Great Elector.

When the famous "Parliament," then assembled in St. Paul's Cathedral, was upon the point of completing its work, the committee on the constitution submitted to it the following article: —

"The constitution of the Empire may be amended only by vote of both houses and with the consent of the Emperor.

"That such a decision may be valid there shall be required in both houses: —

"1. The presence of two-thirds of the members.

"2. Two ballots, separated by an interval of at least a week.

"3. In each of these ballots a two-thirds majority of the votes cast."

It was, plainly, the system with which the statesmen of the German Confederation were familiar. A plan introduced by the Extreme Left proposed to place the Emperor, in relation to the Reichstag, in a position analogous to that held by the President of the United States in relation to Congress, and to grant him only a suspensive veto upon legislation. The same plan, signed by Wigard, Schüler, and H. Simon, proposed the application of this

American veto also to the case of constitutional revision. This proposal was rejected. But the Assembly, while adopting the plan of its committee, added to it the following amendment, which materially altered its importance: —

"The consent of the Emperor shall not be necessary, if the same decree shall be passed, without alteration, in three consecutive ordinary sessions. In this respect, an ordinary session which shall not continue at least four weeks, shall not be taken into account."[1]

This proposition, which was signed by Gülich, Schreiner, Reh, Zoll, Mittermaier, Schüler and Wigard, was adopted by 272 votes against 243, in the session of March 27, 1849. We see, by the respectable size of the minority, a minority which includes the names of Dahlmann and Waitz, of Robert von Mohl and Zachariae, that, upon the question whether the co-operation of the Emperor was necessary for the revision of the constitution, the assembly was very much divided.[2]

Having reached the end of its labours, the Parliament of Frankfort offered the Imperial Crown to the King of Prussia. Frederick William refused it, wishing to receive

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[1] *Verfassung des deutschen Reichs*, Frankfort-on-the-Main, 1849, Art. 196. Cf. Art. 101: —

"A decree of the Reichstag which has not obtained the consent of the imperial government may not be re-introduced during the same session.

"If the same decree shall be passed by the Reichstag without alterations, in three consecutive ordinary sessions, it shall acquire the force of law at the end of the third session even if the consent of the imperial government shall not be given. In this respect, an ordinary session, not lasting at least four weeks, shall not be taken into account."

[2] *Stenographischer Bericht über die Verhandlungen der deutschen constituirenden National-Versammlung in Frankfurt a. M.*, herausgegeben von Professor Franz Wigard, Frankfort-on-the-Main, 1840. VII. 6051.

it, as did the old "Kaisers," by election of the German princes, and not from the hands of the representatives of the nation. The sceptre and the globe of the Empire seemed to him the insignia of a feudal principality which the people had no power to confer. For him the source of authority lay in the blood of the ruling houses.

In this he disagreed with the chief jurists of his time. To-day it would be otherwise. German science appears to be charmed by absolutism. Have not thirty years of military fortune, the splendour of the task accomplished by a feudal dynasty, the resurrection through fire and blood of the old Empire upon the field of battle, have not Düppel, Königgrätz, and Sedan been for something in this evolution of German thought?

Is not this thought perhaps upon the point of receiving a new setting? This is a question that Europe will certainly ask herself before consenting to be drawn on further in this direction.

CHAPTER VIII.

THE CONSTITUTIONS OF AUSTRIA.

THE vast Empire of the Hapsburgs did not escape the movement which shook all Europe in 1848. In Austria, as in Prussia, a constitution was prepared by a national assembly, whose fate was remarkably similar to that of the constitutional convention of Berlin. It was not long before this assembly, convoked at Vienna, was first removed far from the capital, to Kremsier, in Moravia, then prematurely dissolved by the government. Its work, thus brought to nought, was replaced by a royal charter. A few years ago the minutes of the deliberations of the committee on the constitution of this Austrian "*Reichstag*" were published. The scheme which it elaborated contained the following articles: —

Amendments to the Constitution.

Art. 158. The legislative power shall have the right to declare that any provision of this constitution ought to be amended. This declaration shall necessitate the dissolution of the houses and the immediate convocation of a new *Reichstag*.

Art. 159. The new *Reichstag* shall act upon the matters subjected to revision. That a decision which shall involve a real modification of the constitution be valid, there shall be required a two-thirds majority of the members present, in each house, and a quorum of three-fourths of the mem-

bers of each. The vote must be *viva voce* and according to the roll call.

Art. 160. The Emperor shall have an absolute veto upon the decrees of the *Reichstag* which alter the constitution and by which the constitutional rights of the crown might be diminished.[1]

The charter, granted by Francis Joseph, March 4, 1849, adopted the provisions contained in Article 159 of the Kremsier plan relative to the quorum and majority necessary, in the Reichstag, for amendments. Since the check which this constitution received December 31, 1851, by a royal ordinance, none of the constitutional laws of the monarchy, neither the Diploma of October, 1860, nor the Patent of February, 1861, nor any of the Fundamental Laws of 1867, contains any provision concerning amendments. It was not till 1873, when the edifice was for the first time touched, at the time of the great reform which converted the *Reichstag* into an assembly of direct representatives of the peoples, that one of the amendments made in the law of December 21, 1867, in regard to representation in the Imperial Council again put in force the system of 1849. The amendment is thus conceived: —

"Amendments to the present constitution, as also to the constitutional laws which concern the general rights of citizens in the realms and countries represented in the Imperial Council, the establishment of an Imperial Tribunal, the judicial power and the exercise of the govern-

[1] *Protokolle des Verfassungsausschusses im oesterreichischen Reichstage*, 1848–1849, herausgegeben von Anton Springer, Leipsic, 1885, p. 382. The discussion of these articles took place in the session of February 22, 1849. The French and Belgian constitutions were cited in the course of the debate. See Ibid., 276–279.

mental and executive power, shall become valid only when passed by a two-thirds majority of the votes cast, and in the presence, in the Chamber of Deputies, of at least half the members."[1]

Before being submitted to the Imperial Council, whose president was Count Andrassy, the reform plan of 1873 was presented to the Emperor and received in advance his formal assent.[2]

The constitutional laws which constitute the basis of the "Compromise" upon which rests the union of the "Crown Lands of Hungary" and the "Austrian Royal Lands," being the result of an international compact, provide no special mode of amendment. Naturally they can only be modified in accordance with the same forms followed in their establishment. This is the principle which it was considered necessary to formulate expressly in the similar act by which the union of Hungary and Croatia was effected:—

Art. 70. "This compromise, after having received the sanction of the sovereign, shall be inserted among the national laws of Hungary and of Croatia-Dalmatia-Slavonia as a common fundamental law. It is at the same time decreed that this compromise shall not be the object of the special legislation of either of the contracting parties and that no amendment shall be made in it except by the same method used in the conclusion thereof, and with the co-operation of all the powers participating therein."

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[1] Art. 15 of the constitutional law of December 21, 1867, supplemented by the law of April 2, 1873.

[2] Gumplovicz, *Das oesterreichische Staatsrecht*, Vienna, 1891, p. 97.

BOOK II.

LATIN AND SCANDINAVIAN GROUP.

THE monarchies of Central Europe which form what may be called the German Group have accepted that part of the theory proclaimed by the Revolution which asserts that the public law of the state ought to be defined, at least in its general outlines, by a constitution.

But they have not admitted that this constitution must proceed from the sovereignty of the nation, in the sense given this term by the Revolution. Another group of monarchical states, which has felt more profoundly the influence of the new ideas, has gone further in committing itself to the democratic principle. Adopting the constitutional form, the states of this class, like those of the German group, have had recourse in a more or less pronounced way to the fiction of a contract. But, in the national compact formed in these states the nation has been neither the subordinate nor the equal of the prince; in several of them it has been explicitly declared sovereign. This group comprises most of the independent European monarchies of the second rank and those recently erected. Italy, Spain, Portugal, Sweden, Norway, Denmark, the Netherlands, Luxemburg, Belgium, Roumania, Greece, Servia, and Bulgaria may be reckoned as belonging to this class.

The principle common to all the constitutions of this class is that no amendment shall be made without the consultation of the people in regard to it. This rule seems to be without exceptions. It is expressly stipulated in those constitutions which contain amendment clauses. It is tacitly recognized, established as it is in usage, in the states whose constitutions do not themselves determine the procedure to be followed in adopting amendments.

CHAPTER I.

ITALY.

ITALY possesses a constitution of a unique character. It is a royal charter, extended progressively to the larger part of the present kingdom by a certain number of popular ratifications (plebiscites). The *Statuto*, bestowed by Charles Albert upon his Piedmontese and Sardinian subjects, March 4, 1848, has entered into force successively in Lombardy (1859), in Emilia, Tuscany, the Neapolitan Provinces, Sicily, the Marches and Umbria (1860), in Venetia (1866), and finally in Rome (1870), by virtue of a series of laws and decrees recording the will of the people, expressed by plebiscites. Here, then, is a compact *sui generis*, in the establishment of which a king and several peoples have acted successively as sovereigns.

This statute makes no provision for amendment. When it was granted in 1848, its author regarded it, if not as unchangeable, at least as only to be replaced by a new charter. It was purely an act of the royal prerogative, and in this respect it has taken on a certain democratic character only by becoming, in consequence of plebiscites, the constitution of Italy.

The articles of the *Statuto* have never been formally abrogated or amended, but nevertheless the evolution of constitutional law has constantly gone on. On the one hand certain usages have become established, what Americans call "constructions" of the constitution. On the other hand the statute has been indirectly modified by

ordinary legislation. Thus there have grown up alongside the constitution a certain number of constitutional laws, detracting from it in certain particulars, completing it in others. These statutes, which are plainly compromises of circumstances with the rigour of the law, have thus far drawn their force from the fact that they have never been enacted precipitately and that they have always had in their favour the undoubted support of public opinion. It has become an established custom never to submit to the Parliament in final debate a plan of this character without having first given the country a chance to pronounce itself, through a general election.

We base this assertion upon the important work on the public law of the kingdom of Italy with which M. Brusa has just enriched the Marquardsen collection. Writing for a German publication the Turin professor seems to anticipate in the minds of his readers a comparison against which he would warn them. He insists upon the part the country plays, the rôle of public opinion, in the origin of this extraordinary legislation. Then he adds in conclusion: "It is, in short, the general opinion that the work and results of the plebiscites could not be destroyed by mere laws of parliament."[1]

Here, in fact, is the system of constitutional "bases," differentiated from the rest of the fundamental act, which is found at different times, and under different forms, in Norway, France, Greece, and certain South American republics. According to the theory which, in M. Brusa's opinion, is very generally held in his country, these bases are removed from the range of parliamentary action. But what are they? The formula of the plebiscites has not

[1] *Das Staatsrecht des Königreichs Italien* (Marquardsen: *Handbuch des öffentlichen Rechts der Gegenwart*), Freiburg in Breisgau, 1888–1891, p. 15.

been everywhere the same. While the people of Tuscany and Emilia have declared in favour of the annexation of their country "to the constitutional kingdom" of Victor Emmanuel, the Neapolitans and Sicilians have ratified the following more complex declaration: "The people desire Italy to be one and indivisible, with the constitutional royalty of Victor Emmanuel and his legitimate descendants."

Whenever the question of a particularly grave change shall be raised, it may become difficult to agree upon the nature of the constitutional principles which establish approval by the people. And it seems that Italy may have an increasing interest in inserting, in her constitution, an explicit amendment clause.

These circumstances, joined to the prestige of German science, were necessarily destined to exert an influence, in the direction already foreseen, upon the jurists of the peninsula. Especially in the last few years have several of them given their adherence to the doctrine which recognizes no essential distinction between constitutional law and ordinary law.[1] We have, however, just seen that Italian public law, which is not the prolongation of Sardinian public law, is far from being analogous to that of Prussia, as regards the sources from which it is derived.

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[1] Cf. Palma, *Corso di diritto costituzionale*, Florence, 1878, I. 190. Lampertico, *Lo statuto ed il Senato*, Rome, 1886, p. 78.

CHAPTER II.

SPAIN.

In regard to the introduction of amendments the constitution of Spain, like that of Italy, is silent. This has not, however, always been the case. The famous constitution of the Cortes of 1812 contained the following articles: —

3. "Sovereignty resides in the nation; and for this reason the nation alone possesses the right to establish its fundamental laws."

. . . . . .

375. "During eight years, dating from the complete inauguration of the constitution, no change, no addition, no reform in any of its articles may be proposed."

376. "That any change, addition or reform may be made in the constitution, the house which shall be charged with the final determination of this change or reform, shall receive special powers for this purpose."

377. "Every proposed amendment to the constitution must be made in writing, and approved and signed by at least twenty deputies."

378. "The proposed amendment shall be read three times, with an interval of six days between the readings; and after the third reading the deliberation shall be upon the question whether this proposition shall be admitted or not to discussion."

379. "If it shall be brought into discussion the procedure shall be according to the same formalities and

methods prescribed for the framing of laws; after which a vote shall be taken as to whether it shall be discussed anew in the next Cortes. For a decision in the affirmative a two-thirds majority of the votes cast shall be required."

380. "The succeeding Cortes, after having observed in all particulars the same formalities, shall have the power, in one or the other of the two years of its session to declare, by a two-thirds vote, that special powers to make the proposed amendment ought to be asked for."

381. "This declaration having been made, it shall be communicated to all the provinces; and according to the time when it shall have been made the Cortes shall decide whether the special powers shall be granted to the house immediately following or to the one next succeeding that."

382. "These powers shall be granted by the electoral juntas of the provinces, by adding to the ordinary powers the following clause: —

"They likewise give them the special power to make the constitutional amendment mentioned in the decree of the Cortes, the text of which is here given [here follows the literal text of the decree], conforming in every particular to the provisions of the constitution; and they promise to recognize and consider constitutional what their representatives shall consequently establish."

383. "The proposed amendment shall be again discussed; and if it shall be approved by two-thirds of the deputies, it shall become a part of the constitution, and shall be proclaimed as such by the Cortes."

384. "A delegation shall present the adopted amendment to the King that he may cause it to be proclaimed and sent to all the authorities and into all the parts of the realm."[1]

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[1] A French translation of the constitution of the Cortes of 1812 is given in Dufau, Duvergier, and Gaudet (*Collection des constitutions, chartes et*

So complicated a procedure, needless to say, was never destined to undergo the test of a practical application. The constitution of 1812 was repealed in 1823, by a decree of Ferdinand VII. When the question of its renewal and revision was agitated, the general Cortes, convoked for this purpose in 1837 by the Queen Regent Maria-Christina, were unable, as we can easily understand, to follow any of the forms which it prescribed for its amendment. Impressed with the difficulties contained in the chapter on constitutional amendment, they found it advisable to drop it completely from their work.

This example was followed in 1845, in the constitution of Isabella, and it was not until 1857 that the title reappeared, in a plan which was adopted by the Cortes, but which did not receive the royal consent[1] and which was never promulgated. In imitation of this plan, the consti-

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lois fondamentales des peuples de l'Europe et des deux Amériques, Paris, 1823, V. 85, 137) and the documents essential to the history of this famous text in the important publication of M. Manuel Fernandez Martin, *Derecho parlementario español*, Madrid, 1885, II. 664 seq.

[1] "Concerning constitutional amendments."

Art. 87. "The Cortes and the King may declare that the constitution ought to be revised. They shall at the same time determine when this revision ought to take place and the article or articles to be revised."

Art. 88. "Immediately after this declaration shall have been made the King shall dissolve the Senate and the Chamber of Deputies. In the decree convoking the new Cortes which shall assemble within two months after the dissolution the text of the decision mentioned in the preceding article shall be inserted in full."

Art. 89. "The new Cortes shall possess constituent functions solely in reference to the contemplated amendment or amendments."

Art. 90. "For the vote upon all resolutions pertaining to revision, a quorum shall be required in each house of two-thirds of the members composing it."

Art. 91. "The debate upon revision being ended in both chambers, the article or articles amended, if this occurs, become part of the constitution, and the Cortes may continue its session as an ordinary legislative body."

tution of 1869, framed by the assembly which later offered the throne to Prince Amedeus of Saxony, contained the following sections: —

Art. 110. "The Cortes, on their own initiative or on the proposal of the King, may decide upon a revision of the constitution. To this end, it shall determine the article or articles to be revised."

Art. 111. "Immediately upon this declaration, the King shall dissolve the Senate and the House, and a new Cortes shall be summoned which shall assemble within three months from the date of dissolution. In the summons the decision of the Cortes, mentioned in the preceding article, shall be inserted."

Art. 112. "The chambers shall have constituent power only to deliberate upon the contemplated revision. This debate closed, they shall continue their session as an ordinary Cortes.

"As long as the Cortes shall remain constituent neither of the chambers can be dissolved."

These provisions reproduce the text of the plan of 1857 with the sole difference that a quorum of two-thirds is no longer required.

In 1876 it was deemed expedient to again omit the amendment clause. Are we to see here the desire to introduce, in the future, the method of revision by ordinary legislative enactment, or the desire to exclude all partial revision? Events do not as yet permit us to give an opinion on this subject.[1]

[1] It is well known that in 1890 an electoral law established, or rather re-established in Spain universal suffrage, which had been introduced by the constitution of 1869, then abandoned in 1877, three years after the restoration of Alphonse XII. It was possible to effect this important reform without touching the constitution, because Art. 27 declares this subject to be of a purely legislative character.

CHAPTER III.

PORTUGAL.

THE system of the Spanish Cortes of 1812 was taken up in 1822 by the Cortes of Portugal, and very much simplified. The period before the expiration of which no amendments to the constitution could be proposed was reduced by half, the numberless deliberations were reduced to two, — one in the assembly which proposed the amendment, the second in that which was invested with full power by the electoral body. In each one of these debates a two-thirds majority was required in voting.[1]

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[1] Art. 26. "The nation is free and independent and cannot be the property of any one; it alone possesses the power to make, through its deputies in the Cortes, its constitution or fundamental law, independent of the royal sanction."

Art. 27. "This constitution, once made by the present extraordinary and constituent Cortes, may not be amended or modified during four years dating from its promulgation, and, in the case of those articles whose execution depends upon regulating acts, dating from the publication of these acts. These amendments and modifications shall be made in the following manner: —

"After the first period the desired amendment or modification may be proposed to the Cortes. The proposed amendment shall be read three times, at intervals of a week, and if it be admitted to discussion and if two-thirds of the deputies present agree upon its advisability, it shall be changed into a decree requiring those who are to elect deputies for the following legislature to insert in their commission special powers for carrying through the desired amendment, by binding themselves to recognize it as constitutional, if it shall be adopted.

"The legislature, invested with these powers, shall again discuss the proposed amendment, which, after having been adopted by a two-thirds

The charter, which Dom Pedro bestowed in 1826, and which is still the fundamental law of Portugal, reproduced almost word for word the provisions of the constitution of 1822. The sole essential change is, that the decree by which full powers are required of the electoral body becomes a law, and is subject, as such, to the royal sanction: —

140. "If four years after the constitution of the realm shall have been sworn to, any one of its articles is held to require amendment, a proposition to that effect shall be made in writing. This proposition must originate in the Chamber of Deputies, and be supported by a third of its members."

141. "The proposition shall be read three times, with an interval of six days between the readings. After the third reading the Chamber of Deputies shall decide whether it will discuss the proposition, all the while conforming to the rules of ordinary legislative procedure.

142. "If it shall be brought into discussion, and if the necessity of amending an article of the constitution shall be recognized, a law shall be passed which shall be sanctioned and promulgated by the King in the ordinary form, and by which those who shall elect the deputies for the following legislature shall be enjoined to confer upon them a special mandate for the proposed amendment."

143. "In the first session of the following legislature the question shall be introduced and if the change or addition in the fundamental law shall be adopted, the amendment shall be joined to the constitution and solemnly promulgated."

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majority, shall be immediately regarded as constitutional law, and comprised in the constitution. It shall be presented to the King to make public and to put into execution throughout the realm."

144. "Those only are constitutional acts which determine either the respective limits and attributes of the political authorities or the political or individual rights of the citizens. Every act, not constitutional, may be altered by ordinary legislatures, without the above-mentioned formalities."

The charter of Dom Pedro introduced the division of the Cortes into two houses. Hence the new provision which ascribes the constituent initiative to the popular elective house. Further, it is to be noticed, that revision is rendered less difficult by the suppression of the special majorities previously required for each one of the debates to which it gave rise. Finally, and this is a rather unusual peculiarity, a precise definition determines what shall be regarded as constitutional acts.

CHAPTER IV.

SWEDEN.—FINLAND.

In 1772 the Estates of Sweden, promulgating as the fundamental constitution of the realm, a statute through which the royal power, long checked by the nobles, was more firmly lodged in the hands of Gustavus III., made the following declaration:—

"Arbitrary power, or what is commonly called absolute sovereignty, we utterly abhor; we hold it to be a blessing and likewise a source of pride, as free and independent orders, enacting laws and subject to laws, to live under the government of a king clothed with an authority limited by laws, and to be able to lead peaceful lives under the protection of laws. We hope that this happy constitution will deliver us and our country from the dangers and disorders which spring from arbitrary power, aristocracy and divided and irresponsible authority. We, on our side, promise to yield obedience to this constitution, and never to assail the form of government thereby established; we make this promise with all the greater assurance, as His Majesty has already declared that his greatest glory is to be the first citizen of a free people."[1]

In Sweden, as in England, the representative system dates from the old regime, but there was this difference

[1] *Regeringsform* of August 21, 1772, *in fine.*

between the two countries, that, in the realm of the Vasas, constitutional forms were defined by positive documents. In this respect it may be said that the Reformation accomplished in that country the political work which triumphant Puritanism just missed accomplishing in England. Gustavus Adolphus and his chancellor Oxenstiern prepared a sort of constitution which was promulgated in 1634, shortly after the death of the hero of Lützen, and which it is interesting to compare with Cromwell's "Instrument of Government."

It is earlier than the English and American documents, but it cannot be ascribed the same importance. As its name, *Regeringsform*, indicates, it is a co-ordination of the rules and usages of the country. Had its author lived, it might perhaps have had some influence abroad, in the Protestant states of Germany, but, unfortunately, at the time of its publication the land of Gustavus Adolphus had just lost her greatest prince, and, with him, the hope of presiding over the destinies of an empire.

The first codification of the present public law of Sweden dates from 1809. It was made in the form of a constitution, established by the Estates and accepted by the king, Charles XIII. In it is found the following provision: —

Art. 112. "Neither the constitution nor the other fundamental laws shall be changed in any way without the unanimous consent of the King and of all the Estates of the realm; a motion to this effect shall not be made in full Diet but must first be addressed to the committee on the constitution, which shall propose it to the Estates, if it shall deem it wise and expedient; the Estates may not, however, pronounce upon it until the following Diet."

In 1866 the old distinction of the four orders — nobility, clergy, bourgeoisie, and peasantry — disappeared and the

Riksdag was divided into two houses. It was necessary to alter the provision that required for amendments to the constitution, "the unanimous consent of the King and all the Estates of the realm." The system in force to-day was then established.

Regeringsform, Art. 81. "The present constitution, as well as the other constitutional laws of the realm, shall not be altered or abrogated except by a decision of the King and Riksdag, in two ordinary sessions. The decisions of the Riksdag, upon constitutional questions proposed by the King, shall be made known in the manner prescribed by the organic law of the Riksdag. If the Riksdag adopts an amendment proposed by its own members its decision shall be submitted to the King. In this case the King shall, before the end of the session, take the opinion of the Council of State upon the question and shall make known to the Riksdag in the Throne Room his consent or the reasons which lead him to refuse it."

Art. 82. "Every decision of the Riksdag approved by the King or every proposition of the King adopted by the Riksdag of the nature of constitutional amendments, shall have the force of constitutional law."

These texts are completed by Art. 64 of the constitutional law concerning the organization of the Riksdag, also dated 1866: —

"The projects for the adoption, modification, interpretation, or abrogation of constitutional laws which may only be presented in an ordinary session may be rejected in the same session, but they may not be definitely adopted or approved except as mere projects, which shall then be postponed, until the first ordinary session, convened after elections to the second house shall have been held through-

out the realm. They shall then be taken up for a new deliberation. If the plan shall be adopted in this session by both houses, it shall be considered a resolution of the Riksdag; moreover, the houses shall have no right to make any modification in projects thus proposed. No resolution upon postponed projects may be assigned to any other session than the one just designated, except through an agreement on this subject between the king and both houses."

Swedish law facilitates the formation and development of constitutional acts and has from early times considered them the guaranties of public liberties, but it carefully provides that their character shall not be thereby impaired. To avoid the possibility of a confusion of the process of constitution-making with ordinary legislation, it is hedged about with forms of great solemnity. The king and the houses communicate on this subject in the Throne Room, as if for a sort of renewal of the compact which unites the nation and the dynasty.[1] Further, constitutional amendments are never promulgated separately. Their adoption involves the publication and insertion in the official bulletin of the whole of the code thus revised.[2]

The grand duchy of Finland, which was Swedish down to 1809, received charters from Gustavus III. in 1772 and 1789. These charters were confirmed by the Czar Alexander I. when he assumed the title and functions of grand-duke. In 1864, a committee of the Diet was charged by

[1] Riksdagsordening, Art. 79. "The proposition made to the King, decided by the Riksdag, and the replies to the projects presented by him to the Riksdag, shall be handed to the King in writing. As regards the propositions of the King relative to the formation, modification, or abrogation of a constitutional law, the reply of the Riksdag, if it shall carry approval of the royal plan, shall be delivered in the Throne Room, on a day determined by itself." Cf. Regeringsform, Art. 81.

[2] See Dareste, *Les constitutions modernes*, Paris, 1883, p. 99.

Alexander II. to codify these two documents, as well as all the rules of the existing public law, into a single fundamental act, bearing the title of "Plan of Government for the Grand Duchy of Finland." Article 71 of this act of the Diet reproduces, in regard to amendments, the system of the old charters and, consequently, of the Swedish constitution of 1809, which had itself been patterned after its predecessors. A modification, however, was imposed by the Czar, that the constituent initiative should belong exclusively to the Emperor and Grand-duke. On the other hand, proposed amendments presented to the Diet are reserved for the decision of a subsequent assembly, unless two "orders" out of four demand it.

Art. 71. "No constitutional law shall be made, modified, interpreted, or abrogated except upon the proposal of the Emperor and Grand-duke and with the consent of all the orders; propositions of this kind may be discussed in the session in which they are made or, if at least two orders shall demand it, they may be laid aside till the following Landtag, which shall make the final examination of them."

The orders in question are the orders of knights and nobles, the clergy, the bourgeoisie, the peasantry. They may assemble in the same place to confer together, but not to vote.[1]

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[1] For a purpose, easily understood, certain organs of the Russian press, particularly the *Moscowskiya Vedomosti*, and the *Novoye Vremya*, have attempted to show that the old charters of Finland had not been formally adopted by Alexander I. This thesis has been easily refuted by the *Nya Pressen* of Helsingfors. The articles in the last journal have been collected and made accessible to the European public by an English translation which has just appeared in Stockholm. (Edward Hisinger, *On the Validity of the Fundamental Laws of Finland*, Stockholm, 1892.)

CHAPTER V.

NORWAY.

THE Norwegian constitution is the work of the national convention of Eidsvold, which proclaimed, in 1814, the independence of Norway, hitherto a Danish province, and elected Prince Christian of Denmark, then governor of the country, king. (May 17.)

Norway had been promised, by the allies, to the King of Sweden, as a reward for his aid against Napoleon. After the battle of Leipsic, the Treaty of Kiel (January 14, 1814) guaranteed the fulfilment of this promise. Bernadotte, who had become prince royal by adoption, was sent into Norway with his army, and the king chosen by the Norwegians, who did not admit that their country might be given away without their consent, was betrayed by the fortune of war and compelled to convoke a new assembly, into whose hands he abdicated. The crown was then transferred to the King of Sweden, Charles XIII., who accepted the constitution of Eidsvold.

This constitution may be compared from different points of view with the work of the first constituent assembly of France and that of the Spanish Cortes of 1812, but its amendment clauses are far more succinct. The influence of Swedish law had averted all exaggerated complexity from the procedure.

112. "If experience shall prove that any part of this constitution of the kingdom of Norway requires modifica-

tion, a proposition to that effect may be made at an ordinary Diet and publicly printed. But it shall belong to the following ordinary Diet to decide if the change proposed shall be made or not. No such amendment, however, may be contrary to the principles of this constitution. It may only have for object the alteration of certain special provisions which will not at all alter the spirit of this constitution. Two-thirds of the members of the Diet must agree upon such a change."

The old Diet, or *Storthing*, met only once in three years. In 1869, this system having been replaced by that of annual sessions, the article concerning the revision of the constitution was modified. It was established that "the proposition may be made in the *Storthing*, at the first ordinary session after a new election," and that the decision may be taken "in one of the ordinary sessions after the following election."

Nothing in the text of Art. 112, given above, can give rise to the supposition that the intervention of the Crown is necessary for a change in the constitution. The constitution-framers of Eidsvold seem to have wished to adhere in this respect to the principles of the French constitution of 1791 and the Spanish constitution of 1812, both of which they had in mind, and which, in this case, exclude royal sanction. Nevertheless, such intervention has always taken place. This has sprung from the contractual character which events themselves have given to the Norwegian constitution,[1] and explains the grave con-

[1] As Professor Burgess, of Columbia College, New York, has shown, this character is, to a certain extent, established by the formula employed for the ratification of the constitution which contains the express mention of the agreement between the King Charles XIII. and the extraordinary *Storthing* of the realm of Norway. (Constitutional Crisis in Norway, in the *Political Science Quarterly*, June, 1886, Vol. I., p. 263.)

flict which grew out of this question a few years ago, between the government and the *Storthing*. In 1872 the assembly adopted an amendment establishing the responsibility of the ministers to Parliament. The government demanded, as the condition of its adherence, that the parliamentary regime be established with all its consequences, and that the right of dissolution be given to the Crown. The *Storthing* refused and reaffirmed its first vote, April 8, 1874. As the king persisted in refusing his approval, the contest continued, now in the assemblies, now before the electoral body, until 1880, when, for the third and last time, the conditions of the government were rejected by a considerable majority and the first plan maintained.

If the decree of the *Storthing* could have been considered as belonging to the domain of ordinary legislation, it would have acquired force of law, in consequence of the third vote, the king having only a suspensive veto upon legislation. The idea of adopting this ground prevailed at first among the majority, led by Sverdrup. But as the ministry maintained, and rightly, that it was a question of constitutional law, and that it was subject to an absolute veto, the *Storthing* went back to the letter of the Art. 112, which said nothing concerning this veto, and felt authorized by this significant silence to declare that its decree had become the fundamental law of the kingdom. Insertion in the official bulletin having been refused, it appeared in special publications. The ministers were impeached and condemned by the High Court (Rigsret) for having given the king counsels tending to cause him to violate the constitution (February 24, 1884). Oscar II., seeing that the movement was verging toward a revolution which might sweep the monarchy entirely away, had the wisdom to yield to the amendment in discussion, upon the con-

dition that the *Storthing* should refrain from claiming for itself alone the right of revision.

Thus the political crisis was ended without a conclusive settlement of the legal point involved, because the assembly made no pledge for the future, and Art. 112 has not been modified. In the course of the conflict the government demanded of the faculty of the University of Christiania an opinion upon the point of law. This opinion, delivered March 23, 1881, with but one dissenting voice, asserted that the king possessed an absolute veto in constitutional matters "because one of the departments of the State may not, on its own authority, increase its own attributes, to the prejudice of another."[1]

This, of course, is merely begging the very question, namely, whether the *Storthing*, in adopting a constitutional amendment, acted as one of the ordinary departments of the State. If the constitution admits an extraordinary constituent power, and if it confides this power to the *Storthing*, chosen by a general election, the electors in which have been informed of the proposition made in a preceding assembly, it is impossible to deny this *Storthing* the right to revise the constitution, even without the consent of the king, when such is its will. On the other hand, if one recognizes and wishes to maintain the contractual character of the Norwegian constitution, one cannot admit that it may be modified without the consent of the monarch. For a contract, whose clauses depended upon the good pleasure of one of the parties to it, would no longer be a contract; it would be a one-sided obligation. The conclusion is that the customary law based on precedents, what might be called the unwritten constitution of Norway, is at variance with its written consti-

[1] See Dareste, Ibid. II. 161. Cf. Pierre Dareste, *La dernière crise politique en Norvège* (*Revue des Deux Mondes*, November 15, 1884).

tution, and that it will be necessary, sooner or later, either to harmonize the latter with the former, by introducing into Art. 112 a provision concerning the royal veto, or to break with custom and assert, in conformity to the existing text, that, within the limits of its mandate, a *Storthing* elected by the people to revise the constitution may exercise the sovereign power alone and without the co-operation of the prince.

The Act of Union of Sweden and Norway, dated August 6, 1815, was voted by the *Storthing*, accepted by the Estates of Sweden, and approved by the king. Article 12 is as follows: —

"As the provisions contained in the present act are in part the reproduction of the constitution of Norway, in part additions to it, founded upon the powers given by the constitution to the present *Storthing*, they shall have and preserve, in what concerns Norway, the same value as the constitution of this realm and may only be modified in the manner prescribed in Article 112 of this constitution."

CHAPTER VI.

DENMARK AND ICELAND.

DENMARK owes its constitution to the liberal movement of 1848–1849. It has been revised several times, notably in 1866. The article which determines the amending procedure received at that time the following form:—

Art. 95. "Proposed amendments to the present constitution may be presented to the *Rigsdag*, in ordinary or extraordinary session. When a proposed amendment shall have been adopted by both chambers, if the government shall be willing to concede it, the *Rigsdag* shall be dissolved, and new elections shall be held, both to the *Folkething* and the *Landsthing*. If the resolution shall be adopted without alteration by the new *Rigsdag*, in ordinary session, it shall have the force of constitutional law."

This system plainly resembles the Swedish system. In 1849 it was deemed necessary to require two deliberations of the *Rigsdag*, followed by a dissolution and a new vote. In 1855, the German condition of a quorum of three-fourths and a majority of two-thirds of the votes cast was added.[1] In 1866, Denmark felt the serious inconvenience of these numerous restrictions. The amendment of 1855 was abandoned, and one of the preliminary deliberations of the *Rigsdag* was abolished.

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[1] Constitutional Law of October 2, 1855.

The special constitution granted in 1874 to Iceland, upon the demand of the *Althing*, contains an article which reproduces the provisions of Art. 95 of the Danish constitution, with the single difference, which serves to simplify the process still further, that the Althing is legally dissolved by the adoption by both houses of the proposed amendment.

Art. 61. "Proposed amendments to the present constitution may be introduced into the Althing, at ordinary or extraordinary sessions. When a proposed amendment to the constitution shall have been adopted by both houses, the Althing shall be immediately dissolved, and new elections shall be held. If the new Althing shall adopt the proposed amendment without alteration, and it shall receive the royal approval, it shall have the force of constitutional law."

CHAPTER VII.

THE NETHERLANDS. — LUXEMBURG.

As we have seen, the constitution of the Netherlands, dated August 24, 1814, was one of the most remarkable of the time. In certain respects it may be considered the link which binds the chain of the republican constitutions of the Revolutionary epoch to that of the charters and compacts of the Restoration. The Batavian constitution of 1798 had taught the principle that the country must be consulted whenever a revision of the constitution is proposed. From Swedish public law it received, through the medium of the Norwegian constitution, the rule which the French constitution-makers of 1791 failed to see, that the amending process must not be embarrassed by dilatory formalities.

We have already cited, in speaking of Luxemburg, the chapter of this constitution relating to amendments.[1] In 1848, after the transformation of the States-General into a national representative assembly, directly chosen by the people, this chapter received the following wording : —

On Amendments.

196. "Every proposal to amend the constitution shall state expressly the amendment proposed. A law may be enacted declaring the desirability of taking the proposal as thus given into consideration.

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[1] See above, p. 56.

197. "After the promulgation of this law the chambers shall be dissolved. The new chambers shall examine the proposed amendment. They may adopt only by a two-thirds majority vote the amendment proposed in accordance with the above-mentioned law.

198. "No amendment to the constitution or to the law of succession may be made during a regency.

199. "Amendments adopted by the King and the States-General shall be solemnly promulgated and affixed to the constitution."

Independently of the changes resulting from the new organization given the States-General, this text, which remained unchanged at the time of the revision of the constitution in 1887, simplifies very much the old amending process. The extraordinary quorum is suppressed, and the majority necessary for adoption is reduced from three-fourths to two-thirds of the votes cast.

When the grand duchy of Luxemburg received, in 1841, a charter distinct from that of the Netherlands, its sole provision touching revision was: —

Art. 52. "The present law may be modified only with the consent of the royal Grand Duke and the States assembled in double representation."

In 1848, when a constitution replaced the charter granted rather hastily by William II., articles concerning revision were inserted in it, corresponding in substance to those of the new constitution of the Netherlands.[1] They were abrogated in 1856, in favour of a

[1] Constitution of the Grand Duchy of Luxemburg, Arts. 118 and 119. The only difference is the maintenance of a quorum raised to three-fourths of the members of the representative assembly; in this way a

system more closely resembling that of the German constitutions.

"No amendment may be made to the constitution without the consent of two different *Landtage*, expressed in two ballots separated from each other by an interval of at least forty days."[1]

As soon as the grand duchy was removed by French diplomacy from the North German Confederation, it returned to the Dutch system. The constitution of October 17, 1868, reproduced *in toto* in its 114th and 115th articles the articles 118 and 119 of the constitution of 1848.

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method was sought to counterbalance the great ease of revision in Luxemburg, where there was but a single chamber.

[1] *Verfassung vom 27 November, 1856, Art. 114.*

CHAPTER VIII.

BELGIUM. — ROUMANIA.

THE Belgian constitution of February 7, 1831, was based, in part, upon the French charter of 1830, but in regard to revision, its model did not furnish the example. The National Congress of Brussels had in mind, as was natural, the ancient law of the country, the Netherland constitution.[1] It preserved the principles of the latter and harmonized them with the representative and parliamentary system which it intended to establish. The resulting title is the counterpart of that of the constitution of Holland, which was revised in 1848 under the domination of similar ideas. It is thus conceived: —

Title VII. On the Revision of the Constitution.

Art. 131. "The legislative power shall have the right to declare that this or that particular provision of the constitution ought to be revised. By this declaration, both houses shall be legally dissolved. Two new houses shall be convoked according to Art. 71.[2] These houses may act in agreement with the King upon the points submitted for revision. In this case, the houses may not deliberate unless two-thirds of their members are present,

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[1] See above, p. 56 seq.

[2] This article demands that in case of a dissolution of the houses, the electors shall be convoked within forty days, and that the new legislature shall meet within two months.

and no change shall be adopted unless it shall receive at least a two-thirds majority of the votes cast."

We have just noted, in speaking of the Netherland constitution, the advance of this system over the old one. We must add that it inaugurated the legal dissolution of both houses, in consequence of the adoption of a proposition to amend.[1]

Belgium is the type of those constitutional monarchies which have accepted the principles of the Revolution. In Belgium the question of sovereignty has been determined by the constitution itself. "All powers," says Art. 25, "emanate from the nation." The constitution being anterior to the monarchy, the intervention of the Crown became indispensable for the accomplishment of the constituent function, only when the throne ceased to be vacant. The sovereignty exercised in its fulness by the National Congress of 1831 was limited, in fact, in consequence of the election of Leopold I. and his formal acceptance of the constitution, by the compact thus concluded between the nation and the ruling house. As long as the king respects this compact, the nation cannot legally restrict the authority which it has conferred upon the hereditary executive. But the oath to observe the constitution is a condition of accession to the throne. The heir apparent is not invested with complete authority by the death of the occupant of the throne. He is simply entitled to become king by renewing the compact through a solemn promise to

[1] The project of the committee on the constitution, appointed by the provisional government October 6, 1830, had retained the old provision concerning the quorum of two-thirds and the three-fourths majority. But the congress suppressed the quorum and reduced the size of the majority. The project was signed: Van Meenen, Van Gerlache, Dubus, Lebeau, Blargnies, Charles Zaude, Mathieu, Devaux, and Nothomb.

observe it. As long as this formality remains unfulfilled, there is an interregnum, and the royal power is exercised by the Council of Ministers "in the name of the Belgian people." [1]

Since its promulgation the work of the National Congress of Brussels has remained in force. On several occasions it has served as a model to the new continental states and is ordinarily regarded as the perfect type of a constitution of a parliamentary and liberal monarchy. Quite recently a proposition to amend has arisen which aims at the establishment of universal suffrage, a factor unknown to the constitution-makers of 1831. For the first time the king has been called to exercise the royal prerogative on such a question, and — a thing unheard of in the annals of parliamentary royalty and which shows how far democratic ideas have progressed — he has declared his desire to use it to bestow upon the people the direct, effective exercise of this latent sovereignty which has down to the present appeared only in the formulas of constitutional law. Leopold II. has asked that the legislative plebiscite or, as it is called in Switzerland, the *referendum*, be introduced in Belgium, the initiative in consulting the people being bestowed upon the Crown. This, in his opinion and in the opinion of eminent jurists and publicists, is the best check to that hasty legislation to which the extension of the suffrage may give rise.[2]

The dissolution of the national legislature is a two-edged sword. The government can resort to it only in certain cases which are now becoming more and more

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[1] Article 79 of the constitution. This case occurred in 1865. Cf. Vauthier, *Das Staatsrecht des Königreichs Belgien*. Freiburg in Breisgau, Marquardsen Collection, IV. 1, 5, p. 23, note 5.

[2] See in the *Indépendance belge*, December 20, 26, 27, 29, 1891, the articles of Émile de Laveleye on the Royal Referendum.

rare. Parliamentary custom compels it almost always to yield to the majority of the houses. If, whenever the decision of this majority seems to him contrary to the interests of the State, the king could appeal to the electoral body, without throwing the country into the excitement inevitably attending a general election, his influence upon Parliament would certainly be more considerable. The royal veto would thus cease to be merely apparent and become a reality. It would call forth eventually the veto of the real sovereign, the nation.

Although Leopold II. has freely used the personal influence which he is able to exert upon the members of Parliament in the furtherance of this idea; although it has been approved by his advisers, and has been incorporated in the first plan submitted by the government to the Central Section of the House of Representatives, it has encountered determined opposition among the ranks of the conservative majority, led by M. Woeste. The ministry has been obliged to capitulate, at least in appearance, and in the new propositions which it has submitted to the Senate and House Committees on Revision M. Bernaert no longer mentions the referendum. It is also true that he no longer mentions universal suffrage. The reform is limited to the introduction of a system of qualifications according to education and occupation and to the extension of the suffrage to those holding real estate of a certain yearly rental.

It is already evident that this programme arouses and will arouse violent protests. The advanced liberals, who demand for all the right to vote, have adopted for their platform the former proposal of the government, and we may easily foresee that even if the two-thirds majority make the revision, leaving out universal suffrage, this would only be the beginning of a new agitation to obtain

it. Sooner or later the question will have to be settled in favour of the masses, and then the idea of Leopold II. will perhaps come to the front again.[1]

If the principle of such an innovation were once adopted, the admission would logically follow that the sovereign people, who might be consulted upon the fate of ordinary laws, and who would thus be acting as legislators, might likewise be called upon to ratify the constitution, as in Switzerland and the United States. The rejection of this consequence of the adoption of the referendum would mean the overthrow of the entire edifice of Belgian public law, which is founded upon the pre-eminence of the constitution, for, otherwise, there would be called into play in ordinary legislation a higher sanction than that which is required in the making of the constitution.[2]

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[1] The above was written before the final adoption of the amendments of 1893. After heated debates, which for a long time remained unfruitful, and under pressure of an agitation among the masses, which was so great as to cause fear of a revolution, a kind of balanced universal suffrage was introduced into the Belgian constitution. The check which the king desired to provide by establishing the *referendum* was found in the grant of a double, and even, according to circumstances, a triple, vote to citizens who fill, singly or cumulatively, certain conditions, respecting age, taxation, householding, legitimate parentage, amount of property, or of ability, as ascertained by means of a diploma or certificate, or resting on a legal presumption.

This absolutely new system of universal suffrage, balanced by a plural vote, has not yet had a sufficient test in practice. It remains to be seen if it will justify the anticipations of its promoters. According to the issue of the experiment, the chance will be more or less remote of the royal referendum reappearing on the order of the day of Belgian assemblies.

The provisions concerning the method of amending the constitution underwent no change in 1893.

[2] To any one who has studied close at hand the theory and the working of what are called "popular rights," it is plain that, when we speak of appealing to the legally organized referendum, we cannot possibly mean to demand a mere expression of public opinion, in consequence of which, as the first report of the Bernaert ministry to the Central Section maintained,

The Roumanian constitution of 1866 was copied after that of Belgium. Title VII. reproduced almost verbally what has just been described, and underwent no modification at the time of the revision of 1884: —

Title VII. On the Revision of the Constitution.

Art. 128. "The legislature shall have the right to declare that this or that particular provision of the constitution ought to be revised. By this declaration, which shall be read three times, at intervals of fifteen days, in public session, and approved by both houses, the latter are legally dissolved, and new houses shall be summoned within the time prescribed by Art. 95.[1] The new houses may make enactments, conjointly with the sovereign, upon the points submitted to revision. In this case the houses may not deliberate unless two-thirds of the members composing each are present, and no change can be adopted if it does not obtain at least a two-thirds majority vote."

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the different constituted powers might preserve their liberty of discussion and decision. This liberty would, in reality, reduce itself to that of discussing and deciding conformably to the will of the country. When such an expression has been given, in legal form, by the electoral body, speaking over and above the Parliament, in the name of the nation, which the constitution has declared to be the source of all power, it is the most absolute order that can be given in the State.

[1] Six months.

CHAPTER IX.

GREECE.

THE first Greek constitutions, framed in the midst of civil discord, contained no amendment clauses.[1] This was also true of the one which King Otho I. sanctioned in 1844, and which was modelled after the charter of Louis Philippe. The present constitution, established after the election of George I., in 1864, by a constitutional convention sitting at Athens, seems to have been inspired in this particular by the Norwegian constitution.

Art. 107. "The constitution can not be revised *in toto;* however, certain of its provisions, not fundamental and carefully enumerated, may, ten years after its promulgation, be revised if the necessity for such revision be duly established. The necessity for a revision shall be considered sufficiently established if the House shall demand it, in two consecutive legislatures, by a special resolution, adopted by a three-fourths majority of the total number of its members, and designating the provisions to be amended. This revision once resolved upon, the existing House shall be dissolved, and a new one convoked, invested with special powers. This new House, having a member-

[1] Article 154 of the constitution of Troezen (1827), which conferred a sort of dictatorship upon Count Capodistrias, provided for the appointment of a committee from the legislative body (βουλή), which should then submit to this assembly its suggestions upon the constitution. This article established no method of revision.

ship twice as large as the House of Deputies, shall act upon the matter submitted to revision."

Following the example of the Storthing of Eidsvold, the constitutional convention of Athens, in formulating the above article, set royal prerogative completely aside. It might, by using the Belgian formula, which bestows the initiative in revision upon the "legislative power," have included in this general expression the king and the House (βουλή) to whom collectively Art. 22 assigns the exercise of this power. This it did not do. On the contrary, it specified that the necessity for a revision would be sufficiently established by the decisions of the House.

The requirement of a three-fourths majority of the total membership, declaring in the affirmative, in two consecutive legislatures, joined with the Norwegian provision which forbids the alteration of fundamentals and permits innovations of merely minor importance, renders Art. 107 of little practical danger to the Crown. Since 1874, when revision became possible, the obstacles raised by this article have sufficed to bring to naught all attempts of the kind. These provisions would, moreover, suffice, in default of contrary traditions, to attenuate, if not to modify entirely, the character which the Greek monarchy received, in 1832, at the time of its foundation in consequence of a formal compact.

After the election of Prince Otho of Bavaria, and before the arrival of the Regents who were to wield the power until his majority, a congress was convoked at Argos and assembled at Pronia, to establish a constitution. The powers subscribing to the treaty of London brought about its dissolution. The note sent to the provisional government, in September, 1832, by the resident ministers of France, England, and Bavaria, contains the following: —

"No definite constitution, no fundamental law, shall be proposed or approved without the participation of the royal authority, inasmuch as such a proceeding would be in flagrant contradiction with the act by which the Greek nation notified the three powers of the election of its sovereign."

In 1832, an assertion of principles made by the representatives of the powers which had guaranteed the independence of the country, was a formal order. The Greeks submitted. But, when they felt themselves masters of their own domain, they also insisted upon affirming their principles. In Art. 107 the national pride had its revenge.

The prince has a legal guarantee against the decisions of a possible constituent assembly in the document itself, which withdraws from amendment the fundamental provisions of the constitution. The difficulty lies in defining these provisions. Who shall solve the question what is fundamental and what is not? Here there may be the seeds of a future conflict.

The Athenian Assembly referred the final deliberation and vote upon the proposed amendment to a special convention formed by doubling the ordinary representation of the country. This was copied from the constitution of the Netherlands and the French constitution of 1791, which enables us to compare, as we shall see, the Greek system to the more indigenous system in operation in the Servian monarchy. Furthermore, the conditions under which it arose being such, the political institutions of Greece stand, in respect to the character of the constituent power, half way between those of the parliamentary monarchies of Europe and those of the democratic states whose public law rests solely upon the principle of national sovereignty.

CHAPTER X.

SERVIA. — BULGARIA.

THE supreme authority which, in union with the prince, establishes and modifies the constitution in Servia, is a national assembly called the *Grand Skoupschtina.* This authority was not created by the present regime, but is anterior to the old monarchy itself.

The Skoupschtinas[1] existed among the Servian tribes, even before their settlement upon the Danube. Under Étienne Némania, first Kral of Servia (1165–1195), and his successors, they became one of the component elements of the State. All the heads of families could take part in them. The members came together armed. The deliberations took place in the open air, and in the assembly were lodged all powers. These meetings resembled somewhat the old May Days of the Germans and Franks, and the *Landsgemeinden* of early Switzerland. Douchan, the great Tsar, who distrusted them, and yet, despite his great power, did not feel sufficiently strong to abolish them, tried to render their meetings less frequent and to make them purely representative. It is evident, from the preamble of the *Laws and Ordinances* of this prince, that at the Grand Skoupschtina which presided over their promulgation, there were present only the dignitaries of the church, the *knèzes* (magnates), the governors of provinces and cities, and a small number of prominent bourgeois.

[1] From the Servian *skoupiti*, "to assemble."

The Skoupschtinas vanished, under Turkish domination, to reappear after three centuries at the beginning of the national uprising. It was assemblies of this sort which conferred the military dictatorship upon Karageorge (1804), then the principality upon Miloch and his descendants (1817 and 1827). As soon as the power of the prince became firm enough the government sought to render the Skoupschtinas less frequent. They were convoked as rarely as possible and their sessions abridged, power to do this not being limited by statute. It was only after many conflicts that the organization of the ancient national assemblies, attempted by the ephemeral charter of 1835, was regulated by constitutional laws, at first without success, in 1858 and 1859, but finally in 1861.[1]

The law of 1861 distinguished two kinds of assemblies, the ordinary Skoupschtina and the Grand Skoupschtina. The first must be convoked by the prince, at least once every three years, for purposes of general legislation. The second was an extraordinary assembly, four times as large, which should only be called together to elect a new prince, to confirm the choice of an heir apparent, or to appoint a regency.

The constitution of 1869 developed the system which had been outlined in 1861, making the ordinary Skoupschtina an annual assembly and increasing its powers. The Grand Skoupschtina, convoked to deliberate upon and to adopt the constitution, was naturally designated to decide upon amendments which might be proposed in the future. But it was expressly stipulated that its decision should not become law until it had received the approval of the prince. The right of initiative was bestowed

[1] The foregoing details are taken from Ubicini. See his two works, *Serbes de Turquie*, Paris, 1865, and *Constitution de la principauté de Serbie*, Paris, 1871.

both upon the prince, addressing the ordinary Skoupschtina, and upon the latter itself. A two-thirds majority in two consecutive legislatures was required for the adoption of amendments.[1]

King Milan before abdicating caused the Servian statute to be revised. The principality having been transformed into a kingdom, in 1882, he desired to strengthen the throne he was about to yield to his son, still a minor. The new constitution was promulgated, December 22, 1888. To the more or less definite provisions, given above, was added a more complicated form of procedure to be used in case the Skoupschtina wished to exercise its right of initiative in revision. The article received the following wording: —

Art. 201. "Propositions tending to introduce modifications or additions into the constitution, or to interpret one of its provisions, may be presented by the King or by the National Skoupschtina.

"A proposition of this character must contain the formal enunciation of all the points of the constitution upon which the proposed amendments, additions, or interpretations may bear.

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[1] Art. 131. "Propositions tending to introduce alterations or additions into the constitution or to interpret one of its provisions, may be presented by the prince to the Skoupschtina or by the Skoupschtina to the prince. — For adoption of such a proposition by the Skoupschtina a two-thirds majority shall be required, also two consecutive ordinary Skoupschtinas must decide in the same way. — After this procedure shall have been carried out, a Grand National Skoupschtina shall be convoked to decide definitively if and in what way the proposed modifications or additions shall be introduced into the constitution, or what interpretation shall be given to the point in question. This decision of the Grand National Skoupschtina shall have executory force after receiving the approval of the prince."

"If the proposition be presented by the King, it shall be communicated to two Skoupschtinas, chosen in two consecutive elections; the Skoupschtina shall then be dissolved and the Grand National Skoupschtina shall be convoked, within the space of four months.

"If, on the other hand, a proposition of this kind shall proceed from the Skoupschtina, the Skoupschtina shall vote upon it on three different occasions, and at intervals of five days between two consecutive votes.

"To make an enactment upon a proposition of this character, at least three-fourths of the number of deputies fixed by the constitution must be present at the session; and the proposition shall be considered accepted if two-thirds at least of the deputies present vote in its favour.

"The proposition once adopted in this way by two Skoupschtinas, chosen in two consecutive elections, the Skoupschtina shall be dissolved and the Grand National Skoupschtina shall be convoked within four months, counting from the day of the approval of the proposition.

"In both cases, the Grand National Skoupschtina can make enactments only upon the amendments and additions to be introduced into the constitution and the interpretation of the constitution, contained in the proposition by virtue of which it has been convoked.

"The decisions of the Grand National Skoupschtina shall take effect when they shall have been approved by the King."

Article 130 enacts that twice as many deputies shall be elected to the Grand Skoupschtina as to an ordinary Skoupschtina. The constitution of 1869 had retained the fourfold proportion established in 1861, and provided that the deputies to the grand national assembly should be elected by the people alone. This was because the king

had the right to choose a fourth of the members of the ordinary assembly. This last provision having disappeared from the constitution of 1888, it was no longer necessary to insist upon the exclusive right of the nation to choose the grand assembly. On the other hand, as the institution of the princely deputies was replaced by the obligation, for each *okrong* (department) to send to parliament at least two persons of university training (Art. 100), it was likewise specified, in Art. 130, that this provision did not apply to the election of the Grand Skoupschtina.

The constitution of 1888 introduced, for elections to the assembly, the system, advocated by John Stuart Mill, of the *electoral quotient*, which aims to secure the representation of minorities. This is the object of Arts. 89–94.[1] As the possibility of a check was foreseen, an article was inserted in the new statute which will render its alteration possible without too much difficulty.

Art. 202. "By way of exception, Arts. 89, 90, 91, 92, 93, and 94 of the present constitution may, at the expiration of a period of six years, be subjected to constitutional revision, upon a proposition voted by the Skoupschtina in the ordinary way."

Under actual conditions it does not seem that minority representation has much chance to live in the State of Servia, and that, too, for a reason independent of the greater or less advantages which it may in itself be held to possess. It is evident, in truth, that in an assembly chosen according to this system, the conditions put upon the Skoupschtina in the exercise of its right of initiative

[1] An electoral law of March 25, 1890, in 154 articles organizes the procedure of elections with an unparalleled luxury of details.

make constitutional revision almost impossible of realization, and that if the country ever desires to use its right in this particular, in a legal way, it will have to begin by revising the articles which prevent the formation of a strong and stable majority in the midst of the national legislature.

It is true that another and shorter way has been followed in almost all the countries where the framers of the constitutions were so imprudent as to pile up obstacles against changes to be effected in a legal way. It is to be feared lest the Servians be tempted sooner or later to choose this way. In 1869, the Grand Skoupschtina, convoked to deliberate upon a plan presented by the regency which was appointed after the assassination of Michael Obrenovitch, commenced by repealing, by virtue of the supreme authority which it held from the nation, a recent law forbidding it to exercise constituent functions during the minority of the prince.[1] In 1888 King Milan considered himself authorized by circumstances to disregard all the rules prescribed for amendment by the constitution of 1869. A new plan was drawn up by a committee of seventy notables, appointed by the government, and submitted *en bloc* to the Grand Skoupschtina, to be adopted or rejected by it without amendment. The Councillor of State Pavlovitsch, a former minister, gives an account of this summary proceeding in these words: —

"The committee, presided over by the King, had been at work for two months. Speaking generally, every question had been solved and every difficulty overcome. This result reached, thanks to the coöperation of all the political parties, represented by their most influential and most

[1] Ubicini, *Constitution de la principauté de Serbie*, p. 74 seq.

respected members, King Milan conceived an idea as original as it was practical. In order to avoid new discussions upon the same questions, in the grand national assembly he charged the government to present the new plan of constitution in entirety, that is, in such a way that the assembly would have to adopt it integrally, without alteration, or simply reject it.

"This determination once reached, the King remained firm and immovable to the end. All attempts to persuade him to change certain provisions were in vain.

"The committee chosen by the grand national assembly made a very remarkable report, in which their statements and explanations caused the advantages of the new constitution to stand forth clearly, in comparison with that of 1869. The committee recommended the assembly to adopt the project without alteration. This being the case, the discussion could not be lengthy. The result of the vote was: 498 for, 75 against, 3 refusing to vote and 15 deputies absent.

"The following day, December 22, King Milan made a very patriotic address, closing the session; he signed the constitution and placed it in the hands of the president of the grand assembly."[1]

If any member of the government felt conscientious scruples about the constitutionality of this proceeding, its defendants had to combat them by maintaining that Art. 131 of the existing statute was applicable to partial revision and not to the total revision which was then being prepared. Nothing in the text of this article authorizes such a reasoning, and, if such an argument was put forward, was it not seen that it might be applied with as

[1] *Annuaire de législation étrangère*, published by the Société de Législation comparée, Paris, 1889, p. 837.

much justice to Art. 201, by which the framers flattered themselves they were assuring the stability of the new statute? The provisions of this article concerning the initiative of the assembly furnish the only example, in Europe, of the enlargement of an amendment clause once introduced into the constitution of a country. It is, in this respect, in contradiction with the general progress of contemporary constitutional documents. Under these conditions, and in view of such precedents, it might easily happen, moreover, to the great advantage of minority representation, that the nation might some day invoke august examples in order to avoid observing the restrictions of this article.[1]

The Treaty of Berlin, in its Art. 4, provided that the principality of Bulgaria should have a constitution. Such a statute was framed by the assembly of Tirnovo, in April, 1879. After the example of the Servian constitution it established two kinds of national assemblies; the ordinary *Sobranié* and *Grand Sobranié*. The latter is composed and constituted like the former, with the single difference that its membership is double. It wields constituent

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[1] King Milan lately showed that if he was little troubled by the provisions of the statute of 1869, he was even less hampered by those of the constitution of 1888, of which he was himself the father.

The Servian courts having declared unconstitutional and void an *ukase* repealing the bills which kept him out of the country, he simply had the existing constitution abolished and the former one restored by his son (May 21, 1874). This is revision *à la turque*.

How far the young King Alexander will be able to proceed in the way of *coups d'état* upon which he was so soon induced to enter, nobody can tell. At any rate, one may affirm without fear of contradiction that he has, at least for a time, made his country fall from the rank of those states, whose constitutional law a student of political science is expected to investigate.

power, upon the initiative of the prince and the ordinary national assembly.

Art. 167. "Proposals to modify or revise the constitution are subject to the same procedure as the proposals of ordinary laws."

Art. 168. "For the adoption of proposed amendments a majority of more than two-thirds of the members of the Sobranié shall be required."

Art. 169. "These same proposals shall then be submitted to the examination of the grand Sobranié, convoked for this purpose; a two-thirds majority shall likewise be necessary for the adoption."

Under the reign of Alexander I., the constitution was suspended. Extraordinary powers had been conferred upon the prince in 1881, to accomplish reforms which were to be submitted to the Grand Sobranié for ratification. The annexation of Eastern Roumelia, the war with Servia, and finally the forced abdication of the conqueror of Slivnitza, prevented him from carrying out the proposed revision. Since the accession of Prince Ferdinand a return has been made to the statute of 1879. But every one knows that the Bulgarian question, which is also a constitutional question, has not yet been solved.

RECAPITULATION.

If we admit the existence of a constituent power, and if we ask how it is exercised in the different countries whose legislation we have thus far studied, we do not find it difficult to lay down certain general principles.

In the German group, two strongly marked tendencies are manifest. One, the older, which proceeds particularly

from the idea that the constitution is a compact between the prince and the representatives of the nation, considers revision as a renewal of this compact. This revision, therefore, is the result of a solemn agreement between the parties concerned. The right of initiative, vested at first in the prince alone, was early granted to the parliaments also. The fear that the latter would be too susceptible to the influence of the Crown caused the adoption of particular guaranties in the matter of final decision, such as special quorums, extraordinary majorities, numerous deliberations. The other tendency dates from the charter granted in 1848 by Frederic William IV. This is the Prussian idea, born of a desire to render the amending process easier, at the hands of a national legislature which the king had promised to consult in the formation of the constitution and the first meeting of which had been dissolved before it was able to finish its task. This tendency has resulted in the almost complete assimilation of constitutional law and ordinary law. This method has followed the fortunes of Prussia, it has spread with the monarchy of the Hohenzollerns, and is to-day the system of the German Empire.

In the second group, comprising the Scandinavian states and the monarchies of Latin Europe, a single great principle dominates all the constitutions: the nation is consulted. The appeal to the country is effected by a dissolution of parliament, and the election either of a new legislature or a special assembly, as in Greece, Servia, and Bulgaria. The final decision upon the proposed amendment belongs alone to a legislature freshly chosen by popular suffrage. In order that the candidates may be called upon to explain themselves upon the amendments which it is proposed to make in the constitution and that the electors may declare their will intelligently, the amend-

ments are defined by the legislative act which declares the necessity of making them. This provision is a rule without exceptions, and the motive which dictated it stands forth clearly from the text of the first constitution of the kingdom of the Netherlands, which has served, in this particular, as a model for all the others.[1]

The participation of the prince ordinarily occurs in the proposing of amendments, in the final decision, or in both. The only exceptions are those established by the Greek and Norwegian constitutions, the latter being interpreted by the Storthing as it sees fit. But, in both cases, the competence of the assemblies which propose and which decide is restricted to changes which do not affect the fundamental provisions of the constitution.

Extraordinary majorities are still required in the legislatures for votes on amendments. Nevertheless, if the Servian constitution be left out of consideration, we see in this respect a tendency, in the more recent documents, to the gradual simplification of conditions of this character. The renewal of the assembly, called to make the final decision, is, in reality, a sufficient guarantee against hasty action.

The liberal monarchies of Europe, which have accepted, in a certain degree, the results of the Revolution, have admitted the principle that the constitution is the highest expression of the national will. They have been led to gradually free the constituent procedure from the checks which were deemed necessary in the days of its infancy. But most of them rightly guard against degrading constitutional law by assimilating it with ordinary law.

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[1] Arts. 229 and 230. See above, p. 56 seq.

III.

DEMOCRATIC CONSTITUTIONS.

BOOK I.

UNITED STATES OF AMERICA.

CHAPTER I.

THE FEDERAL CONSTITUTION.

"*We, the people* of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish* this Constitution for the United States of America."

Such is the famous preamble of the constitution framed, in 1787, by the Federal Convention over which Washington presided. Thus appeared for the first time, in the fundamental law of a great modern state, the axiom of ancient law: *Lex est quod populus jubet atque constituit.* An authority which had been forgotten during fifteen centuries, finally came forth to ordain and establish.

We are no longer dealing with more or less formal compacts, such as are most of the constitutions which we have thus far studied, but with a supreme law, emanating from a single sovereign will. The Federal character of the constitution of the United States was only secondarily and,

we may say to-day, only provisionally qualified by the element of compact. The great victory of the majority in the Constitutional Convention lay in their having induced the individual States to renounce a power in law, which belonged to them in fact, and of which more than one were destined still to boast in the future. A nation is a gradual growth, not a sudden creation. The constitution-framers of 1787 had the future in mind. The principle which they proclaimed and sought to realize as best they knew how has in our day become fact as well as law. The contrary thesis, by which sovereignty was divided, to the injury of the common country, — a thesis long sustained in the interest of a cause, — is now rejected by most jurists and publicists. For this reason, in defining constituent power it no longer seems necessary to distinguish between the public law of the States and that of the Union.

The work of the Federal Convention was submitted to the ratification of the sovereign, the people, in each of the thirteen united States. There was no single and simultaneous vote. The American people, as a whole, had as yet no legal existence. As long as the constitution remained unratified, the State was the sole political unit, and it was through the act of each legislature that the people of each State was to be consulted. This was in accordance with the uniform plan, adopted by the Constitutional Convention. Conventions of delegates, specially chosen to vote for or against the adoption of the constitution, met, each at its own time, in the different State capitals. The result of their deliberations was the acceptance of the plan, at first by nine States, finally by all.

The constitution of the United States was thus established by virtue of a series of successive votes, cast by special assemblies whose members were invested with full

power, and which stand midway between representative bodies and primary assemblies. They may be compared to the electoral assemblies established some years later by the French constitution of 1791.[1] No proposition seems to have been made in the Federal Convention to submit the plan to the direct vote of the people. The system prevalent to-day in the States of the Union, for the ratification of their respective constitutions, was at that day practised in only a few. Those of the South, Virginia in particular, whose representatives were among the chief authors of the plan, were unacquainted with it. At the time of the framing of the constitution by the Philadelphia Convention the principle that the formal approval of the people could alone make it the Great Charter of the American Union was irrelevant, proclaimed though it had been by the Revolution itself. But the mode to be used in obtaining the expression of the popular will was a debated question. A strong minority proposed that the fate of the constitution be decided by the legislatures of the different States. The majority, believing that the fundamental law of the nation required a higher sanction, desired a more direct manifestation of the sovereign will, which should place the constitution above the legislatures.[2] It finally adopted the system of approval by special conventions, regarding it, as *The Federalist* tells us, as a normal mode of appeal to the people.[3]

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[1] The electoral assemblies provided for by the constitution of 1791 were empowered to deliberate upon the verification of the powers of their members.

[2] See Madison, Debates in the Federal Convention of 1787. The Papers of James Madison, New York, 1841 (Published by order of Congress), II. 796 (Session of June 5: Madison's speech), 1177 seq. (Session of June 26; Speeches by Madison, Mason, Randolph, Gouverneur Morris).

[3] *The Federalist*, Lodge's Edition, pp. 236, 244, 247, 314 seq. (Nos. XXXIX., XL., XLIX., L.).

The article which defines the manner of amending the constitution, is plainly the result of a compromise. It is there specified that future amendments shall be submitted by Congress, either to the legislatures or to conventions specially chosen by the people and that they shall become operative only after having obtained the assent of three-fourths of the legislatures or conventions.

Art. V. "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article,[1] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

We see, in this article, the origin of the two-thirds majority, so habitually imposed, subsequently, upon the

[1] Art. 1. Section IX., Clause 1. "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

Clause 4. "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken." (The constitution provides that a census shall be taken within three years after the first meeting of Congress and that this operation shall be repeated subsequently every ten years.)

representative assemblies to which constituent powers are given.

Congress has never availed itself of the clause which gives it the right to prescribe the election of conventions, through which the popular verdict might be obtained. The few amendments which have been made to the Federal constitution have been submitted to the legislatures. It is, however, none the less true that the constitution itself, whose first centenary has already been celebrated, was established upon the sanction of the people, demanded expressly, if not directly. Most commentators insist upon this fact, in order to show the extent of the powers conferred upon the Union and the pre-eminence of federal sovereignty over the individual sovereignties of the States.[1] The foremost of them all is Chief Justice Marshall, sometimes called "the second author of the constitution." His opinion is expressed in the opening remarks of a celebrated judicial decision, as follows: —

"The constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people

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[1] See Daniel Webster, Speeches in Congress, *Works*, Boston, 1851, II. 321, 333, 470 seq.; Speeches before the Senate January 26, 1830, and February 16, 1833; and Joseph Story, *Commentaries on the Constitution of the United States*, Book II. Ch. iii. 4th ed., annotated by Thomas M. Cooley, Boston, 1873, I. 253 seq.

had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the power of the State governments in given cases subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either."[1]

On another occasion, but still in the name of the Supreme Court, Marshall spoke as follows: —

"That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected."[2]

If the principle of constitution-making, as laid down in the fundamental act of the Union, does not in itself differ from that proclaimed by the constitutions of the different States, the method of applying it has been developed and perfected in the public law of the latter, while, because of political circumstances, it was condemned to immobility in the Federal Charter. The result is that upon this point the American system of to-day is to be sought, not in the article which has just been cited, but in the corresponding provisions of the different State constitutions. This system which we are about to examine has, moreover, been sanctioned by Federal usage. It is imposed by Congress upon "Territories" wishing to enter the Union.

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[1] Martin *v.* Hunter's Lessee, 1 Wheaton, 324.

[2] ~~Marburg~~ *v.* Madison (February Session, 1803), 1 Cranch, 176.
Marbury

CHAPTER II.

THE STATE CONSTITUTIONS DURING THE REVOLUTION.

EUROPEAN critics of American democracy almost always make the mistake of looking only at the Federal constitution of the United States and of leaving unexamined the institutions of the several States. It may be said, in their defence, that the Americans themselves are the cause of this, since, for a century, they have devoted all their zeal to the history and criticism of Federal public law and are only now beginning the systematic study of their local constitutions. But the mistake, though explicable and pardonable, is none the less grave. Recently two masters of political science, M. E. Boutmy, in France,[1] and Mr. James Bryce, in England,[2] have called attention to its unhappy consequences. They have easily shown that the institutions of the States are the edifice itself of which the Federal constitution is but the completion, that they are the real foundation of the national institutions, and that American democracy cannot be understood or judged apart from the environment in which its development has taken place.

The form in which the constituent power is at present wielded throughout America is of New England origin. It is based not only upon the principle that the constituent authority resides in the people, but upon this further

[1] *Études de droit constitutionnel*, Paris, 1885.

[2] *The American Commonwealth*, London, 1889.

conception, introduced into modern law by the Puritan Reformation, that this authority cannot be delegated.

We have seen how Cromwell's soldiers attempted to establish their popular compact above Parliament by virtue of the formal adhesion of the citizens themselves. We have seen how the first colonial statutes of Connecticut and Rhode Island were adopted by the general consent of the colonists given through assemblies. The few writers who have noted these facts have been wrong in thinking that the colonists acted thus, because they constituted democratic communities in which, by reason of the small number of citizens, all laws could be approved by their vote. This is an error that might have been avoided by a more careful examination of contemporary documents. The idea of the fugitive Puritans was, that, to establish these communities, as to found a congregation, they must bind themselves together by a compact, and that the unanimous engagement required for this compact could be made by those only who were themselves concerned. When the democratic communities of New England became veritable States, the Puritan conception, taken up and systematized by philosophy, had become the theory of the social contract. Under this new form it presided over the formation and establishment of American constitutions of the Revolutionary period, constitutions whose most perfect expression was that adopted by Massachusetts in 1780. We have read, in the preamble of this remarkable document, the political creed of its authors. It was by virtue of the formula which Jean Jacques Rousseau has rendered famous, but which the Anglo-Saxons had not learned from him, that this constitution was submitted to all the citizens of the State. It could not, of course, receive their unanimous approval. A majority vote was therefore substituted. The fiction,

according to which the will of the majority is binding upon the minority, a fiction, moreover, long established by the practice of local self-government, thus received the approval of the new State. The constitution, in theory a social compact, thus became in reality the sovereign decree of the people. This transformation was absolutely essential to the realization of the idea, to its incorporation into the domain of facts.

Ever since 1776 petitions had demanded the formation of a constitution for Massachusetts and its submission to the people. The General Court, which was the ordinary representative assembly of the colony, considered it its own duty to undertake the task. Such was not, however, the opinion of the people. They desired a special assembly, "a State Congress chosen for the sole purpose of preparing a plan of government," as declared in a resolution sent abroad by the delegates of the towns of Worcester County.[1] When the plan elaborated by the General Court was presented to the town meetings, in 1778, it was rejected. The enemy was in the heart of the country. The assembly, thus disavowed, might have found in the peril of the country a pretext and an excuse for exceptional measures, but not for a moment did it think of such a thing. The following year, the commissions of its members being about to expire and circumstances promising to be more favourable, the assembly turned to the electors for an expression of the popular will concerning the convocation of a constitutional convention. The resolution is dated February 20, 1779. It inaugurated a procedure, which has since entered into the legislation of most of the States, and for this reason deserves to be inserted here. It gives,

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[1] St. Clair Clarke and Peter Force, *American Archives*, Washington, 1837, 5th Series, III, 866.

moreover, an idea of what an appeal to the people was at that time in Massachusetts.

"*Whereas the Constitution or Form of Civil Government which was proposed by the late Convention of this State to the People thereof, hath been disapproved by a Majority of the Inhabitants of said State:*

"*And whereas it is doubtful, from the Representations made to this Court, what are the Sentiments of the major Part of the Good People of this State as to the Expediency of now proceeding to form a new Constitution of Government:*

"Therefore, *Resolved*, That the Selectmen of the several Towns within this State cause the Freeholders and other inhabitants in their respective Towns duly qualified to vote for Representatives, to be lawfully warned to meet together in some convenient Place therein, on or before the last Wednesday of May next, to consider of and determine upon the following Questions.

"*First.* Whether they chuse at this Time to have a new Constitution or Form of Government made.

"*Secondly.* Whether they will empower their Representatives for the next Year to vote for the calling a State Convention, for the sole Purpose of forming a new Constitution, provided it shall appear to them, on examination, that a major Part of the People present and voting at the Meetings called in the Manner and for the Purpose aforesaid, shall have answered the first Question in the Affirmative.

"*And in Order that the Sense of the People may be known thereon:* Be it further *Resolved*, That the Selectmen of each Town be and hereby are directed to return into the Secretary's Office, on or before the first Wednesday in *June* next, the Doings of their respective Towns on the first Question above mentioned, certifying the Numbers

voting in the Affirmative, and the Numbers voting in the Negative, on said Question."[1]

The question of principle was decided in the affirmative by the citizens, and the majority of the deputies sent to the General Court received the full powers demanded. As a result, special elections were held for the constitutional convention, which the people demanded. By this convention the constitution of 1780 was framed. In the list of its members stand out the names of John Adams, Samuel Adams, Bowdoin, Hancock, John Lowell, Sr., Theophilus Parsons, John Pickering, Sr., George Cabot, Nathaniel Gorham, James Sullivan, Levi Lincoln, Sr., Robert Treat Paine, Jonathan Jackson, Henry Higginson, Nathaniel Tracy, Samuel Osgood, William Cushing, Caleb Strong, David Sewall, Benjamin Chadbourne. "A union of talents and patriotism," says Robert C. Winthrop, "such as the country had never seen up to that time, and whose superior has not been seen since."[2]

The convention, having completed its work, presented it to the suffrages of the people. Town meetings were called several times to deliberate upon it. June 16, 1780, after having counted the votes and discovered that a majority of more than two-thirds had pronounced for the ratification of its plan, the assembly dissolved, after proclaiming "the Constitution of Government established by and for the Inhabitants of the State of Massachusetts Bay."

This constitution, now more than a hundred years old, has received a number of amendments, but has always remained the fundamental law of the Puritan republic.

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[1] *Resolves of the General Assembly of the State of Massachusetts Bay in New England*, Boston, 1778, p. 120 (Official edition).

[2] *Addresses and Speeches*, IV. (Boston, 1886), p. 171.

The last chapter, providing for the possibility of a revision after fifteen years, was thus worded: —

Chap. VI., Art. 10. "In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary, the General Court which shall be in the year of our Lord one thousand seven hundred and ninety-five shall issue precepts to the Selectmen of the several towns, and to the Assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations for the purpose of collecting their sentiments on the necessity or expediency of revising the Constitution, in order to amendments.

"And if it shall appear by the returns made, that two-thirds of the qualified voters throughout the State, who shall assemble and vote in consequence of the said precepts, are in favour of such revision or amendment, the General Court shall issue precepts, or direct them to be issued, from the Secretary's office to the several towns, to elect delegates to meet in Convention for the purpose aforesaid.

"The said delegates to be chosen in the same manner and proportion as their Representatives in the second branch of the Legislature are by this Constitution to be chosen."[1]

When the question of revision was put to the people, at the date and in the manner indicated, a negative reply was given.

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[1] *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, from the Commencement of their First Session, September 1, 1779, to the close of their Last Session, June 16, 1780*, Boston, 1832, pp. 248–249.

Popular participation in the work of constitution-making, thus inaugurated in Massachusetts, was in vogue at about the same time in another New England State, New Hampshire. A first constitution, though prepared by a special assembly, was rejected in 1779 by the town meetings.[1] A second plan was accepted by the people in 1781, on the condition that certain alterations be made. Finally, in 1783, the amendments demanded having been introduced, the constitution of New Hampshire was ratified in its entirety. The amendment clause was reproduced from the Massachusetts constitution, with this difference, however, that the preliminary vote upon the question of the convocation of a constitutional convention was fixed at the end of seven years, instead of fifteen.

To carry out this provision, the town meetings were summoned to declare themselves anew in 1791. Already, it appears, the need of reforms had come to be felt, for the result of the people's decision was the convocation of an assembly charged to draw up amendments. This convention met at Concord. Having finished its work, and wishing to avoid presenting it *in toto* to the electors, as in the case of the unsuccessful project of 1779, or with the request to formulate any modifications desired, as in 1783, it divided the plan into a certain number of subjects, which were submitted separately to the approval of the citizens. Unfortunately, the list of these subjects was far from short, there being seventy-two of them. Upon the vote, twenty-six were rejected, forty-six were adopted. Of the latter, several were in contradiction with those provisions of the old constitution which still remained in force because of the rejection of the former, and the convention was compelled to do what it had thought possible to avoid. It

[1] The text of this plan can be found in the *Collections of the New Hampshire Historical Society*, IV. (Concord, 1834), p. 154 seq.

took up again the work so badly mutilated by the people, removed its inconsistencies, and was finally paid for its trouble by a popular vote which gave the constitution the required two-thirds majority.[1]

This time New Hampshire was satisfied and remained so for a long while. Although the people were frequently consulted in regard to the question of revision,[2] no new convention was demanded before 1850.

Connecticut and Rhode Island having done nothing more than confirm their former democratic charters, after substituting in them the name of the people for that of the king, made no use of their constituent powers during the Revolution. In the nine other States the constitutions of that period were promulgated by conventions none of which, with the single exception of Delaware, had received formal mandates from their constituents.[3] This proves that, even if the principle that the constitution must emanate from the people was firmly and irrevocably established everywhere, ever since independence was declared, yet the method of seeking the expression of the supreme will was not determined. Between the procedure of these conventions which, like that of Virginia, for example, appointed in 1776 to carry on the war against England, themselves assume to declare the supreme law, in the name of their constituents whom they think they

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[1] The result of the vote was proclaimed and the constitution promulgated, September 5, 1792 (cf. Plumer, The constitution of New Hampshire, in the *Historical Magazine*, October, 1868).

[2] The amendment clause adopted in 1792 provided for such a vote every seven years.

[3] In his *Treatise on Constitutional Conventions*, Mr. Jameson, a former judge of the Supreme Court of Chicago, has established this fact in each individual instance. He insists upon the revolutionary character of these assemblies. (*A Treatise on Constitutional Conventions*, 4th ed., Chicago, 1887, p. 112 seq.)

can represent for this purpose, and the procedure of the conventions of New Hampshire which in regard to this matter really co-operate with the primary assemblies of the citizens, there is a middle way, adopted by the last Massachusetts Convention. That method has been frequently copied as American public law has gone on developing throughout the nineteenth century. For, this development being once assured by peace and internal order, the methods of New England were those best suited to the demands of democracy.

The exercise of constituent powers, in all its stages, by a representative body without a special mandate, is compatible with the English theory which makes Parliament sovereign. It is not compatible with the American theory which in this matter has replaced "the King, the Lords, and the Commons" by the people.

CHAPTER III.

THE HARTFORD, BOSTON, AND ALBANY CONVENTIONS.

DURING the Revolutionary period and the first years of independence a constitution appeared to the great mass of people as a sacred text, to whose integrity was linked the destiny of the State, and which should be touched only on occasions of the gravest moment. It seemed that the constitution, which for the first time was serving as the sole base of the social edifice, ought to possess the immobility, the permanence of stone and bronze. But it came to be recognized, as time went by, and men's experience grew larger that, in order to avoid becoming an obstacle to the unceasing progress of the body politic, it should lose something of its rigidity, and, though remaining supreme, should lend itself more or less easily to alteration. The procedure inaugurated in Massachusetts was good for a total revision, but this was rarely wanted, and in the cases which were becoming more and more frequent where a partial revision or perhaps but a single amendment was desired, the election of a convention, after a preliminary consultation of the people, was an expensive, cumbersome means, and one liable to provoke useless agitation. It fell to another New England State to devise the method which was destined to meet this new need, and to gradually predominate throughout the Union.

In 1818, when the old charter of Connecticut, outgrown by the progress of that democracy whose path it had itself broken, was replaced by the present constitution, the

Hartford Convention, before submitting its plan to the people, inserted in it the following article: —

Art. XI. "Whenever a majority of the House of Representatives shall deem it necessary to alter or amend this constitution, they may propose such alterations and amendments; which proposed amendments shall be continued to the next general assembly, and be published with the laws which may have been passed at the same session; and if two-thirds of each house at the next session of said assembly, shall approve the amendments proposed, by yeas and nays, such amendments shall, by the secretary, be transmitted to the town clerk in each town in the State, whose duty it shall be to present the same to the inhabitants thereof, for their consideration, at a town meeting, legally warned and held for that purpose; and, if it shall appear, in a manner to be provided by law, that a majority of the electors present at such meetings shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this constitution."[1]

This article was the result of a happy compromise between the Massachusetts system and the one which had been sanctioned in 1776 by the constitution of Maryland, and adopted in 1790 by South Carolina, and in 1798 by Georgia. In these States, a vote of both houses, repeated after a general election, was the condition required for the adoption of one or several constitutional amendments.[2] Partial revision was, to a certain degree, rendered easier by this procedure. The Hartford Convention profited by

[1] Constitution of Connecticut, 1818, Art. XI. (Poore's *Charters and Constitutions*, I. 266).

[2] Maryland constitution (1776), Art. 59. South Carolina constitution (1790), Art. XI. Georgia constitution (1798), Art. IV. sec. 15.

it, but without abandoning the principle that the people must have the last word. In the provision here drawn up, the members of the legislature received the right of initiative, to be exercised by a two-thirds majority, as in the clause inserted in 1787 in the Federal constitution, and to the town meetings was reserved the final decision, true to New England tradition.

This article was soon after incorporated into the constitution of Maine, when a new State was formed out of the large territory then belonging to Massachusetts. The Portland Convention, which in 1819 framed this constitution, was strongly democratic in spirit. While adopting the article originated by the Hartford Convention, it yet inserted in it a modification, which was destined to be imitated at a later date in other States. It suppressed the double test as a condition for the exercise of the right of initiative. Adoption by a single legislature, by a two-thirds majority of the members in both houses, was considered sufficient for the submission of an amendment to the people.[1]

Alabama's first constitution, framed in the same year as that of Maine, contains a similar provision. But the double test is retained in it, with the curious proviso that the consultation of the sovereign people shall take place between the two votes of the legislature. The constitution-framers of Alabama, more familiar with the strategies of the Indians than with the distinctions of political science, thought they could unite the Connecticut plebiscite and the general election of Maryland.[2]

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[1] Constitution of Maine (1819–1820), Art. X. sec. 4.

[2] Constitution of Alabama (1819) ("Mode of amending and revising the constitution"). The anomaly has disappeared from the constitution of 1875, through the suppression of the second vote of the legislature (Art. XVII. § 1).

The Boston Convention, which in 1820 revised the constitution of Massachusetts, introduced into it, on the proposal of Daniel Webster, the article which has been given above. The only modification which it considered necessary was the substitution of a simple in the place of a two-thirds majority, required for adoption by the Senate. The number of senators in Massachusetts being so small, it was not desirable to give to a few persons the power to stop all plans of reform.[1]

The Boston Convention did not consider itself called upon to revise the constitution of 1780 as a whole. It drew up fourteen amendments, which were submitted to the people separately, and five of them were rejected.[2] The proceedings of this assembly, published daily in the *Boston Daily Advertiser*, and afterward brought out in a single volume, aroused a wide-spread interest throughout the Union. Among its members, by the side of John Adams, its venerable honorary president, then eighty-six years of age, sat statesmen and jurists like Josiah Quincy, Daniel Webster, John Bradley Varnum, Levi Lincoln, Joseph Story, Isaac Parker, and James Trecothic Austin.

In 1821, the convention assembled at Albany to revise the constitution of the State of New York was able to profit by the deliberations of the one just held in Boston. Also counting among its members men who played an important part in the history of the country, and held

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[1] *Journal of the Debates and Proceedings in the Convention of Delegates chosen to revise the Constitution of Massachusetts*, 2d ed., 1853, p. 404, 406 seq.

The number of State senators was forty according to the constitution of 1780, thirty-six according to the plan of the convention. The plan concerning the reapportionment of seats in the legislature not having been ratified by the people, the number forty was retained.

[2] The result of the vote is annexed to the report of the deliberations of the assembly. *Journal of the Debates, etc.*, p. 634.

in the State which, although it had not yet received the name to which its merit has since entitled it, Empire State, was nevertheless the most important of the Northern States, this assembly likewise exerted a marked influence upon the general development of American public law.

Outside of New England, popular ratification of the constitution or of constitutional amendments had, as yet, neither been recognized in principle nor put into practice in any of the original States. It was, however, adopted by the Albany Convention. In the session of September 29, at the close of a debate in which Martin Van Buren, Erastus Root, Van Vechten, Spencer, Tallmadge, Elisha Williams, Judge Platt, and others had taken part, it adopted the mode of partial revision recently borrowed by Massachusetts from the Connecticut constitution. The provision requiring a two-thirds majority of the votes in the Senate, as in the House, was re-established in the committee's plan and approved. Erastus Root tried to bring about the suppression of the second vote of the legislature by showing that the submission to the people was a sufficient safeguard against hasty innovations. Opposed by Van Vechten, by Chief Justice Spencer, and by Tallmadge, he withdrew his proposition.[1] In the third debate, the advocates of a direct and simple procedure succeeded in carrying through a provision that when constitutional amendments were proposed for the first time, a majority vote of both houses in their favour should suffice to impose the question upon the following legislature.[2]

As to the ratification of the work itself, the Albany Convention was not called upon to pronounce upon the

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[1] *Reports of the Proceedings and Debates of the Convention of 1821, assembled for the Purpose of amending the Constitution of the State of New York,* Albany, 1821, pp. 291–294.

[2] Ibid. p. 629. Constitution of the State of New York, 1822, Art. VIII.

principle of its submission to the people, for this had been previously decided in the affirmative by the legislature. Yet, in regard to this, or rather on the occasion of the law convoking the constitutional convention, a conflict had arisen between the different powers which is not devoid of interest. To go back to the beginning of this controversy, and to follow it through its different phases, is to show at the same time how the popular vote upon constitutional measures first appeared in the laws of the State of New York, whence it soon spread far and wide, in the public law of the Union.[1]

[1] The opinion seems to be widespread in the United States that since the first constitution of Kentucky, 1792, all the constitutions of the new States have been submitted to the electors for approval. This is an error. The constitution of Kentucky is the first of those belonging to this category to assert the principle of consulting the people upon the question of calling a convention, but it did not provide for popular confirmation and was not itself submitted to a popular vote. Mr. Bryce, who held this opinion, relying upon Hitchcock (*American State Constitutions*, New York, 1887, p. 16), has recognized his mistake. The last edition of his work contains a rectification upon this point.

CHAPTER IV.

THE ORIGIN OF POPULAR RATIFICATION IN NEW YORK.

GOVERNOR DE WITT CLINTON, in his speech at the opening of the legislature on November 7, 1820, called attention to the necessity of satisfying the very general demand for a revision of the constitution of 1777. He had already insisted upon this point at the beginning of the year, on opening the preceding session, but, in indicating the procedure which he thought should be followed in revising it, he did not go beyond the system already in vogue of the convocation of a constitutional convention, invested with full power to effect certain reforms, the principle of which should be previously determined by the legislature. This time, profiting by the provisions of the law in virtue of which the Massachusetts Convention had just been assembled in Boston, — a law which asserted plainly the principle of popular ratification of the constitution, — he spoke as follows: —

"The constitution contains no provision for its amendment. In 1801, the legislature submitted two specific points to a convention of delegates chosen by the people, which met and agreed to certain amendments. Attempts have been made at various times to follow up this precedent, which have been unsuccessful, not only on account of a collision of opinion about the general policy of the measure, but also respecting the objects to be proposed to the convention. These difficulties may be probably

surmounted, either by submitting the subject of amendments generally to a convention, and thereby avoiding controversy about the purposes for which it is called, or by submitting the question to the people in the first instance to determine whether one ought to be convened; and, in either case, to provide for the ratification by the people, in their primary assemblies, of the proceedings of the convention."[1]

The legislature, stopping at the first of the alternatives foreseen by the governor, adopted a bill convoking an assembly without first submitting any preliminary question to the people. The assembly was to enjoy unlimited powers for the revision of the constitution, upon all matters which it might see fit to modify. On the other hand, its work must be submitted, as a whole, to the verdict of the electors, "all the free male citizens of the State of twenty-one years of age and over."[2]

The principal alterations which the majority of the legislature wished to make in the constitution were: the extension of the right of suffrage, still restricted, for elections to the House of Representatives, to landed proprietors, or occupants of landed estates; the abolition of a system of appointment to State offices which placed them in the hands of a small number of senators, more or less irresponsible; lastly, the abolition of a "Committee on Amendments," composed of the governor, State chancellor, and judges of the Supreme Court, to which the convention of 1777 had given the conditional veto which was bestowed in the other States upon the governor alone,

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[1] *Journal of the Assembly of the State of New York* (44th session), Albany, 1820, p. 11.

[2] *Journal of the Senate of the State of New York* (44th session), Albany, 1820, pp. 48–50.

as the representative of the people. These reforms threatened more than one vested interest, and the calling of a constitutional convention, especially of one given such large powers, must necessarily call forth stubborn opposition in high places. This opposition was not long in showing itself, and, by an anomaly frequent in the history of popular governments, it asserted itself in a proposal even more democratic than the one which it wished to avoid. The "Committee on Amendments," assembled to examine the legislature's bill, made use of its prerogative and returned the law to its authors. Its message, skilfully drawn up by Chancellor Kent, gave as reasons for this veto: —

First, that the bill summoned the citizens to choose a convention clothed with unlimited powers to revise the constitution, without having consulted the people upon the necessity of calling such an assembly;

Secondly, that the bill provided for the ratification of the constitution as a whole, without giving the people the means of choosing, should they so desire, between the different amendments which might be proposed, and of retaining those only which they might consider valuable. If the people were competent to pronounce upon the plan as a whole, they were also competent to judge separately each one of the amendments to be made in the constitution of the State.

To support its agreement, the committee's message cited, as an example, what had occurred in the other States of the Union. As to the precedent of 1801, which was plainly unfavourable to it, it declared that the question then was not of a total revision, and that, even in this case, it would perhaps have been wiser to have consulted the people upon the question of necessity.[1]

[1] *Journal of the Assembly*, pp. 69–71.

The committee appointed by the House to examine the objections of the "Committee on Amendments" made a carefully prepared report, very fortunately preserved *in extenso* in the journal of the Assembly. This report, presented at the session of the ninth of January, 1821, asserted that the principle of an appeal to the people, either before or after the meeting of the Constitutional Convention and the completion of its work, was completely foreign to the public law of the State of New York, and that it was still unknown to the majority of the American constitutions. The committee was not opposed to a plebiscite, but wished it to be single, as provided by the vetoed bill, and not double, as the message demanded.

"It will be seen," said the chairman, Ulshoeffer, "that none of the constitutions where there is a *prior* appeal to the people require any subsequent reference, with the single exception of New Hampshire; nor is any other instance to be found when there is a *subsequent* reference of the amendments, that the prior appeal is required.[1] It would therefore seem to be a constitutional principle, to be drawn from most of these cases, that at some stage of an undertaking to amend a constitution a reference should be made to the people; but whether that be prior, or subsequent, to a convention, seems not material, especially in those cases where the amendments are not made by the legislature, but by delegates of the people chosen for that special purpose; and, indeed, the latter method (a question to be decided by the votes of the people, upon the final ratification of the amendments) is, in the opinion of your committee, the best safeguard to life, liberty, and property."

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[1] This assertion was, as we have seen, debatable.

The committee's report defends the vote *in globo*, disapproved by the governor's message, in these words: —

". . . But it is further objected by the Council, that the bill contemplates submitting the question of the amendments *in toto*, and not affording an opportunity to discriminate as to those amendments. This provision, upon the whole, appears to your committee a matter of expediency. A constitution is a work of system, in which every part is so connected with the whole, and the whole with every part, that it is hardly in the power of human wisdom to strike out particular portions without deranging the economy of the whole. A convention is best calculated for such an undertaking. Indeed, it might be urged, with great force, that the proceedings and decisions of a convention, like those of all large deliberative bodies having a variety of feelings and interests to contend with, must be a work of compromise, where the whole, and not all the several distinct parts, are agreed to by the convention, and should be thus submitted, upon the whole, to the people; otherwise it would be found difficult to unite a majority, either of the convention or of the people, in favour of every part; and consequently the whole system would be deranged by discordant opinions and interests. If propositions, distinctly stated, are negatived, what remains? Does not anarchy ensue? Or are the people not only to strike out, but to amend the proceedings of the convention? If so, the powers of the convention in promoting the public good, by reconciling conflicting interests and opinions, are wholly nugatory. . . .

"The submission of the United States constitution to the States, to be approved or disapproved, *in toto*, is a strong instance in favour of this position. For no one

will deny that the State conventions, in that instance, were better adapted to deliberate, and to decide on the parts to be accepted or rejected, than meetings to be held but for three days at the polls. In that case, the constitution was generally admitted to be defective in certain respects; and the question was whether, upon the whole, it was desirable. It was adopted, leaving it for the constitutional authority afterwards calmly and deliberately to modify and correct the instrument.

"The present constitution of Connecticut was likewise submitted, *in toto*, to the people of that State in 1818. Indeed, no instance, it is believed, is to be found in which a reference for decision was made according to the instruction of the Council. The proposition offered in the present convention of Massachusetts, to submit their doings separately to the people, is the only case where such an idea appears to have been the subject of serious deliberation; and it still remains to be seen whether it is possible for that convention to adopt a principle heretofore considered wholly impracticable, and never acted upon, as your committee believe, in a single instance."[1]

Upon this point, the committee was, as we know, in error. The experiment had been tried in New Hampshire, and was soon to be repeated in Massachusetts. Since then this important question of a submission to the people of the revised constitution as a completed whole has been solved in most of the States of the Union. The course of events has vindicated the committee of the Albany Assembly and the Boston Convention in this way, that the system of submission of the whole has been adopted for entirely new constitutions, resulting from a total revision, and that submission of different individual

[1] *Journal of the Assembly*, 1820, pp. 83–85.

amendments has been practised chiefly in cases of partial revision. The Constitutional Convention of Massachusetts voluntarily assumed the latter alternative; that of the State of New York, the former.

The report which has just been cited was in favour of the vetoed bill, notwithstanding the objections that were made against it. But to put this into effect a new vote on the part of the legislature and a two-thirds majority in both chambers were necessary. It became apparent, after a long debate, that such a majority could not be obtained. It became necessary to frame another bill, and yield, at least in part, to the desires of the committee. The new law provided that the people should be previously consulted as to the necessity of summoning a convention, and left it to the latter to determine how their work should be submitted to the people for ratification. Absolute universal suffrage was not retained in the double plebiscite thus established.[1] To be entitled to take part in the election, if one did not possess landed property or paid no taxes to the State, one must at least have served either in the militia or with the volunteers, or have worked a certain length of time upon the public highways.[2]

The first vote of the people made it plain that a considerable majority favoured the summoning of a convention. Elections took place, and the assembly was convoked at Albany. This assembly adopted the views which prevailed in the legislature in regard to the amendments to be made to the constitution. The right of suffrage was enlarged, as far as it had been for the preliminary popular vote. The system of appointment to non-elective offices

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[1] The election of the convention of 1801 had taken place upon the basis which we have seen adopted in the bill rejected by the Committee on Amendments. See Ulshoeffer's Report, *Journal of the Assembly*, p. 77.

[2] *Journal of the Senate*, p. 158.

was reformed, and the committee which had exercised a veto upon legislation was abolished. The powers of this unpopular council were transferred to the governor. We have already seen what provisions were made for partial revision.

As to the manner of submitting its plan to the people, the convention decided that they should vote upon it as a whole. The reason for this was given in the address sent to the people along with the constitution. This document, drawn up by Erastus Root, who had been a member of the legislative committee whose views we have examined, was thus conceived: —

ADDRESS OF THE DELEGATES IN CONVENTION TO THEIR CONSTITUENTS.

In Convention, Albany, November 10, 1821.

"The delegates of the people, in convention, having this day terminated their deliberations, present to you the constitution of the State, in an amended form, as a result of the arduous and responsible duties which your confidence has imposed upon them. They have adopted this course, from a sense of the great difficulty, if not impracticability, of submitting to the people, for their ratification, in separate articles, the various amendments which have been adopted by majorities of the convention. This difficulty is very much increased by the reflection that the adoption of some articles and the rejection of others might greatly impair the symmetry of the whole. The convenience of having the amendments incorporated with those parts of the constitution which are to remain unaltered will readily be perceived. We, therefore, submit to the people the choice between the old and the amended constitution.

"That difference of opinion should exist among individuals on the various topics which have passed in review before us will not excite surprise. Various local interests and diversity of political sentiments, among a free people, will, of necessity, lead to different opinions. Probably the amended constitution now submitted is not, in all its provisions, in exact accordance with the desires of any individual member of the convention; but, in the spirit of mutual concession and compromise, we have come to a result, which we hope the people, actuated by the same spirit, will approve and ratify. We, therefore, submit it to your investigation, reflection, and final decision, with the most respectful deference, and do most devoutly implore the Supreme Ruler of the universe that he will perpetuate the blessings of national liberty, and endue us plenteously with that wisdom from above, which is profitable to direct in all things."[1]

The vote took place throughout the State, in January, 1822. The result was the acceptance of the constitution by 75,422 votes, against 41,497.[2] The vote had been taken during three days, without discussion, by secret ballot.

At about this time, the modern history of the United States begins. Speaking generally, between the years 1815 and 1830 most of the great questions which are to agitate the century make their appearance upon the

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[1] *Reports of the Proceedings and Debates of the Convention of 1821, assembled for the Purpose of amending the Constitution of the State of New York*, Albany, 1821, p. 658.

[2] J. D. Hammond, *The History of Political Parties in the State of New York*, 4th ed., Syracuse, 1852, II. 94.

The vote upon the constitution, as a whole, in the convention had stood in its favour, 98 to 9. *Reports*, p. 657.

political horizon; the hegemony of the New World, slavery, tariffs, the States-rights ideas of the Southern States, the currency question, universal suffrage. It was in 1823 that President Monroe, in view of a threatened intervention of Spain and Portugal in South America, hurled at Europe the famous declaration which has been summed up in the words "America for Americans." It was in 1828 that Calhoun, adopting and rigorously developing a system foreshadowed by Jefferson and Madison, formulated the famous theory by which acts of Congress might be nullified in those States which refused to submit to them. Lastly, this was the period when the election of Jackson, the "people's candidate," to the Presidency was prepared and realized (1829).

The effect of the great industrial inventions of the beginning of the century, the utilization of steam, the opening of new routes to navigation and commerce, the rise of manufacturing centres, the opening of vast and unlimited lands, all caused the material level of the lower classes to rise more and more rapidly. Popular government received from this an irresistible movement. In 1826, the amendment clause adopted by the Albany Constitutional Convention was for the first time put into practice, and served to introduce the principle of universal suffrage into the constitution of the State of New York. The organization of extra-constitutional political machinery, by means of which the great parties bring about alternately the predominance of their ideas and their men, and which, though too often diverted from its original aim, is still in operation throughout the Union as throughout the State, also dates from this period. This is the critical period, the pregnant moment of American democracy.

The South was not slow in imitating the example of the North, and in following, in its turn, the evolution

of popular government. General Jackson, seated finally in the President's chair by means of Democratic votes, was a representative of the South. The people were consulted in regard to convoking constitutional assemblies in Virginia in 1828, and in South Carolina in 1834. As a consequence, the conventions of Richmond (1830) and Raleigh (1835) were summoned, which submitted to the people the result of their labours. The year 1835 likewise marks the adoption of the New England system by the State of Michigan, which was upon the point of being admitted into the Union, and whose constitution, presented to Congress by President Jackson himself, was at that time considered the model of democratic institutions. This system lacked only the adhesion of Pennsylvania to become universal throughout the entire North. It entered into the constitution of that State in 1838.

CHAPTER V.

THE DEBATES OF THE PENNSYLVANIA CONVENTION (1837-1838).

THE acts of the Pennsylvania Constitutional Convention, which sat first at Harrisburg, then at Philadelphia, excited as wide-spread an interest as did those of the Boston and Albany conventions.

The old constitution made no provision for amendments. The necessity for legislation upon this point was generally felt. The method of partial revision, by submission to the people of a proposition twice passed by the legislature, was adopted without opposition, and a new step was taken in the direction of a simplified procedure, by the suppression of the two-thirds majority in both houses. This applied even to the second test.

Art. X. "Any amendment or amendments to this constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and the secretary of the commonwealth shall cause the same to be published three months before the next election, in at least one newspaper in every county in which a newspaper shall be published; and if in the legislature next afterward chosen such proposed amendment or amendments shall be agreed to by a majority of the members elected

to each house, the secretary of the commonwealth shall cause the same again to be published in manner aforesaid, and such proposed amendment or amendments shall be submitted to the people in such manner and at such time, at least three months after being so agreed to by the two houses, as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the qualified voters of this State voting thereon, such amendment or amendments shall become a part of the constitution, but no amendment or amendments shall be submitted to the people oftener than once in five years: *Provided*, That if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly."[1]

Down to the time of the adoption of this article at Philadelphia, the guarantee of a special majority in the legislature had been considered necessary since the exclusion of the executive from all participation in the enactment of constitutional measures. Since ordinary laws, being subject to the governor's veto, could not be put into force if he opposed them save by their adoption anew by a two-thirds vote of the legislature, it was thought that the enactment of constitutional laws, which were withdrawn from executive interference, ought not to be any easier. It was forgotten that the appeal to the people, to whom such measures were submitted but who did not pass upon ordinary laws, established a sufficient balance. This the Pennsylvania Convention recognized, and from that time forth a simple majority has been generally con-

[1] Constitution of Pennsylvania, 1838, Art. X. (Poore's *Charters and Constitutions*, II. 1565–1566), preserved almost unchanged in the revised constitution of 1873, Art. XVIII.

sidered sufficient in those acts of legislation demanding two successive votes.

This innovation was not brought about without long discussion.[1] A large part of the assembly was frightened at the facility which was to be given to the introduction of amendments into the constitution, "the sacred instrument upon which the stability of our institutions, the very existence of the State, depend . . . etc." This party proposed that the legislature be forbidden to present constitutional amendments before the year 1850, and that thereafter it could exercise its initiative only once in ten years. The majority refused to accede to this, but agreed to a compromise. It was provided that not more than one partial revision could take place within the space of five years, and that if several amendments were submitted to the people at one time they might pronounce separately upon each one.[2]

Thomas Earle, a delegate from the county of Philadelphia, took part several times in the discussion. He was one of the most distinguished jurists of the assembly, and the preliminary plan which served as a basis for its deliberations is attributed to him. He stated as follows the result of American experience in the domain of constitutional revision: —

"Alterations made under the spur of excitement occasioned by the consciousness that they must be then made, or no convenient opportunity will occur for years to come, as well as alterations made in an irregular and unprescribed manner, will be less likely to be moderate and judicious than those made under a system like that re-

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[1] *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania* (1837–1838), XII. 84–102, 225, 242–262.

[2] *Proceedings, etc.*, XII. 307–311.

ported by the committee on future amendments, accessible at all times, but involving great caution and deliberation in the process.

"We have only to recur to our own history, to show the pernicious tendency of the principle now proposed to be introduced. The old constitution of Pennsylvania, made in 1776, provided a mode of amendment through a council of censors, to propose and publish amendments, and then a convention, chosen by the people, to act upon such propositions. This method involved considerable caution and safeguards against rash innovation and against alterations of the government in violation of the popular will. But, unfortunately, this opportunity of amendment occurred but once in seven years; and this circumstance was made the pretext for the violent act of the legislature of 1789, which called a convention upon its own responsibility, as well as for the acts of that convention itself, in altering the constitution, without giving the people any opportunity, directly or indirectly, to pass upon the question of adoption or rejection of the alterations.

"If gentlemen will examine the bill of rights, as now existing, and as we propose also to retain it in the constitution, they will observe its declaration that *the people have at all times an inalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.* Now, it strikes me as somewhat inconsistent, in profession, to make such declarations, and, at the same time, provide that what we have fixed upon as the proper and convenient mode for the exercise of this power of changing the government by act of the people shall only be put in use once in ten years. The inevitable tendency of such policy is to produce violent revolution. When the people feel the need of a

change, and see in your constitution the assertion of their right to make such change, whenever they may deem it fit, they will not always wait five or nine years, for the opportunity of doing it in a particular mode. They will be likely at some time to resort to other means, which may raise a storm in which there will be danger of the wreck of the ship of state. Search all history, and you will find the prominent cause of violent revolutions, both those which have, and those which have not, terminated in despotisms, has been the feeling of the people that they were loaded with shackles, like those which you now propose to put upon them, and that they could get relief only by violent measures.

"If you make the constitution and laws at all times subject to the control of the people, through a prudent and cautious mode of exercising their power, expressly pointed out and regulated, you produce a trebly advantageous effect. First, you make the people contented in the consciousness of their power and authority. Second, you check the rash propensity to change, by the consciousness that you can make a change when you please, and hence there is no urgency for doing it hastily or inconsiderately. Third, you secure the people against the dangers of despotism, which always attend the making of changes in an irregular and undefined manner.

"To give to the people the sovereignty, with a peaceable and orderly mode of its exercise at all times, is the most certain, if not the only, method to preserve peace, order, and republican government. All history shows that the attempts to combine the opposites of the government of the people, on the one hand, and the chaining down the people, on the other, have introduced discord and ended in failure.

" . . . Some gentlemen, unwilling to put the matter

on this ground, have alleged that much inconvenience might be felt by the people from giving permission to the legislature frequently to submit propositions for amendment. He (Mr. Earle) did not apprehend any difficulties of this sort. All history, all experience, shows that the people and their representatives are more disposed to submit to inconveniences, while sufferable, than to make rash changes in their constitution. If you give the mere majority of the legislature the power to alter the constitution at pleasure, without submitting the change to the ratification of the people, there would be, I admit, great danger, for all experience proves the general disposition of the majority, in such select bodies, to abridge the rights of the people at large; but when it is requisite that the propositions for amendment shall pass both houses of two successive legislatures, and then be ratified or rejected by a vote of the people themselves, the real difficulty will be found, not in the proposing of too many alterations, but in the omission to propose those which ought to be made. The legislature will not submit anti-democratic alterations, because they will know that the people will reject them; they will not often submit democratic changes, unless driven to them by the urgency of the people's demand, for legislative bodies are rarely inclined, of their own will, to make such alterations."[1]

An equally interesting discussion was raised by another able jurist, Thomas Merrill, the spokesman of a conservative group. Here, again, the aim being to render constitutional revision more difficult, Merrill proposed that the legislature should not have the right to take it

[1] *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, to propose Amendments to the Constitution 1837–1838,* XII. 230–232.

into consideration without having first received a petition from the citizens themselves, containing a number of signatures equal to a twentieth of the votes in the last State election.[1] Mr. Merrill's amendment, vigorously opposed by the Democrats, was rejected. The idea was an absolutely new one, and the discussion bears witness to the ignorance which then prevailed as to what would be called to-day, according to the expression recently approved by usage in Switzerland, the theory of popular rights. Is it a question of a simple petition or of a real initiative? The assembly has difficulty in comprehending the nature of the right which it is urged to recognize. The advocates of the measure at one time assert that it gives the electors the principal vote in the framing of constitutional measures, in that it gives them the right of initiating changes, while they already have the final decision of them; at another time they declare that the legislature will possess the power to simply disregard the demand for a revision, if such a demand appears to it unjustified. The opponents of the proposition are inclined to consider it under the first of these aspects, but they are no clearer in their explanations than are its defenders. They oppose it by maintaining that it may perhaps become an insurmountable obstacle in the way of progress, that, at any rate, it will only remove the agitation for revision from the legislature to the people from the start, and will involve as a fatal consequence just this instability, this perpetual discussion of the institutions of the country, which ought to be avoided.

The text of the revised constitution was presented to the people *in toto*, along with the text of the constitution

[1] *Proc. and Deb.*, XII. 58–84. According to the average number of the electors who had taken part in the last election for governor, the number of signatures thus required may be estimated at about 10,000.

of 1790, each new provision in the one, each part suppressed in the other, being clearly shown by italics. Twelve thousand copies were published in the English language, three thousand in the German. The members of the convention were enjoined to distribute them in their respective districts.[1]

The popular vote having been counted, according to the decree of the legislature, by the Speaker of the Senate, and announced in the presence of both houses on December 11, 1838, the result showed 113,971 votes in favour of the revised constitution, against 112,759 against it.[2]

This method of partial revision, inaugurated in 1818, and from this time forth adopted in most of the new constitutions, has become firmly established in practice. By adopting this system, American democracy did not, however, intend to discard that of a revision prepared by special conventions, whose work is likewise submitted to the verdict of the people. Both systems, in the form they had taken in New England, and which the adhesion of New York had served to spread throughout the Union, were nothing but the application, to two different cases, of the theory that the electoral body itself is the whole depositary of constituent power. Each one had its place in the edifice of which this theory is the very cornerstone.

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[1] *Proc. and Deb.*, XII. 238. In 1790, 3500 English, 1500 German copies had been published.

[2] Ibid. XII. 260 seq.

CHAPTER VI.

THE REVISED CONSTITUTION OF NEW YORK (1846).

In 1845, though unauthorized by any formal statutory provision, the legislature at Albany, by virtue of the precedent of 1821, submitted to the people the question as to whether a new constitutional convention should be convoked. The vote was 213,257 in favour, with but 33,860 against the calling of such an assembly.

This assembly, convening in the capital at Albany June 1, 1846, introduced into its plan the reforms demanded by public opinion. In the amendment clause, the two-thirds majority required in the legislature for the final adoption of a proposed amendment, was replaced, as in Pennsylvania, by a simple majority. Further, a second section provided, along with the method of partial revision by the legislature, for that of total revision by a convention. The consultation of the people, as to the necessity of calling such an assembly, was appointed in advance for 1866, and from this date on was to occur every twenty years. It was to be permitted in extraordinary cases, whenever both houses should think proper to resort to it: —

"Art. XIII., Sect. 1. Any amendment or amendments to this constitution may be proposed in the Senate and Assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and

referred to the legislature to be chosen at the next general election of senators, and shall be published for three months previous to the time of making such choice, and if in the legislature so next chosen as aforesaid such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner and at such time as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become part of the constitution.

"Sect. 2. At the general election to be held in the year eighteen hundred and sixty-six, and in each twentieth year thereafter, and also at such time as the legislature may by law provide, the question 'Shall there be a convention to revise the constitution and amend the same?' shall be decided by the electors qualified to vote for members of the legislature; and in case a majority of the electors so qualified, voting at such election, shall decide in favour of a convention for such purpose, the legislature at its next session shall provide by law for the election of delegates to such convention."[1]

The addition of a section, expressly providing for total revision by a convention, first occurs in the constitution of Michigan.[2] The idea of fixing a date when the people must be called to pronounce upon the question of the convocation of a constitutional assembly goes back, as we

[1] Constitution of New York, 1846, Art. XIII. (Poore's *Charters and Constitutions*, II. 1365-1366.)

[2] Constitution of Michigan (1835), Art. XIII. sec. 2.

have seen, to the first Massachusetts Convention (1780),[1] and the system of periodical consultations, to the third New Hampshire Convention.[2]

This constitution of 1846, ratified in November of that year, by 221,528 votes against 92,436, has since received a number of amendments. It has, however, remained the constitution of New York, and has served as a model to the conventions of many States which have been formed since its adoption. Article XIII. in particular, has been incorporated in substance into most of the new laws of this character. In the old States, where there has been no occasion, or where it has been judged useless to legislate upon the matter, the principles which this article affirms in regard to total revision have been pretty generally followed, in accordance with custom and precedents. It may therefore be said that, dating from 1846, the constitution of New York has, in a general way, given the American theory its final formula.[3]

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[1] Constitution of Massachusetts, Ch. VI. Art. X.

[2] Constitution of New Hampshire (1792), sec. 100.

[3] The constitution of New York was again revised in 1894 by a convention which finished its labours on the 28th of September. The revision was submitted to the people on November 6, not as a whole but in three parts. The elector was asked to vote first, on the Revised Constitution, except the proposed amendments providing for a new legislative apportionment, and for improvement of the canals; second, on the apportionment amendment; third, on improvement of the canals. Three ballot boxes were provided and all three parts were adopted. Numerous interesting changes were made by the new organic law, but the plan of amendment remains substantially the same as in the constitution of 1846. Instead of leaving it to the legislature to determine how the future constitutional convention shall be elected, the constitution itself makes careful provision therefor. It is further provided that in case constitutional amendments relating to the same subject are submitted at the same time from the legislature and from a constitutional convention, the amendment proposed by the convention, if approved, shall be held to supersede the other. (Art. XIV.) — J. M. V.

In 1851, Maryland, abandoning her former plan of amendment by the legislature alone, adopted the system of popular enactment. Georgia, South Carolina, Missouri, and Arkansas, — Southern States which rejected this plan, — were compelled to adopt it after the war of secession, at the time of the "reconstruction" of their governments. Among the Northern States there were two exceptions at the period of the great contest. Vermont did not give its adhesion to the rule until 1870. Delaware alone has preserved its old legislation, which gives the legislature, re-elected for the purpose, the work of partial revision. This cannot, however, be said to be because of distrust of the popular vote in itself, for the constitution permits a direct appeal to the people as to the advisability of calling a convention when a total revision is proposed.[1]

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[1] In 1890, a constitutional convention revised the constitution of Mississippi. The constitution framed by it, in which the political rights of the negroes are restricted, was not submitted to the people for ratification, notwithstanding the formal provisions of the law. It was a *coup-d'état*.

CHAPTER VII.

THE QUESTION OF POPULAR RATIFICATION BEFORE CONGRESS.

CONGRESS was called upon in 1858, on the eve of the great Civil War, to decide the question of the exercise of constituent powers in the States. Kansas, then a Territory seeking admission into the Union, was torn, like several of its elders, by the violent contests of two parties of almost equal strength, — the pro-slavery and the anti-slavery parties. The former had a majority in the legislature; the latter claimed to have the majority in the State. The question concerned the preparation of a constitution to be submitted to Congress, on seeking the title and rights of a State. Each party made its own. The "free-state men," obliged to act outside the regularly established authorities, were deprived of legal forms. A convention, chosen upon the invitation of an electoral committee and assembled at Topeka in 1855, drew up a plan for a constitution. Submitted to the electors, this plan was adopted by a large majority of those voting, who represented, its authors asserted, the majority of the inhabitants of the Territory. Congress could not approve such a procedure; it rejected the demand for ratification by the Topeka Convention, "whose conduct," the message of President Pierce had said, "would have the character of a real insurrection and would become high treason, if

it should go so far as to offer armed resistance to the decrees of the Federal government."[1]

Emboldened by the check administered their opponents, the Territorial legislature consulted the people of Kansas in regard to calling a constitutional convention, and the resulting affirmative vote caused the election of the Lecompton Convention (September, 1857). The pro-slavery men alone had taken part in the voting. The figures of the votes cast, compared with those of the extra-legal elections to which the Topeka constitution had given rise, seemed to show that the pro-slavery party was really in the minority. The constitution framed at Lecompton was not submitted in its entirety to the people. Voting was allowed upon only one particular clause, which guaranteed property in slaves and the right to hold them, and the question was put in such a way that the rejection of the slavery clause involved the adoption of all the other provisions of the plan. The free-state men kept aloof more than ever from the polls. The result showed only a small number of voters. The almost unanimous adoption of the plan was a strictly party affair.[2] President Buchanan, though favourable to the admission of Kansas with the Lecompton constitution, blamed, in his message to the Congress, the action of the convention in withholding its instrument from the popular verdict. After a long debate, Congress decided that the new State should be admitted, if the people themselves should ratify certain special conditions relating to the rights of the Union over unoccupied lands, mines, etc., *and* the Lecompton constitution. In case of rejection, it should be free to adopt a

[1] Message, January 24, 1856.

[2] 6266 votes "for the constitution with slavery," 567 "for the constitution with no slavery." See an article of Professor Johnston in the *Cyclopedia of Political Science*, III., Chicago, 1884, p. 666.

new constitution as soon as the possession of as large a population as was required for the election of a member to the national House of Representatives should be legally established by a census duly taken.[1] Anticipating this event, the act of Congress determined the procedure to be followed for the election of a constitutional convention and for the submission of its plan to the people. As had been foreseen, the conditions thus laid down were rejected along with the Lecompton constitution.[2]

The State of Kansas was not admitted until 1861, when it entered the Union with an anti-slavery constitution which had been framed by the convention of Wyandotte, and submitted to the people October 4, 1859, in the way prescribed by the Congress.[3]

Since this time the "Enabling Act," the Federal law which authorizes a Territory to form itself into a State and as such to enter into the Union, has always provided that the constitution which has been adopted or shall be adopted, shall in every case be ratified by the people.[4]

In 1861, most of the ordinances of secession and the constitutions framed by the seceding States were not submitted to the vote of the people. Yet South Carolina, Missouri, and Arkansas were the only seceding States which had not admitted the principle that the constituent power belongs to the people. In most of these States the war party could count upon the majority of the conventions; on the other hand, it was very doubtful whether the majority of the people would let themselves be swept on across the Rubicon, of their own accord and without

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[1] 93,340 inhabitants.

[2] August 3, 1858. 10,226 against 138 votes.

[3] Result of the popular vote: 10,421 votes against 5530.

[4] See the first example of this provision in the Enabling Act for Minnesota (1858), 11 U. S. Stat., p. 166.

compulsion. The claim was then made that the conventions, being the people assembled, were sovereign. William L. Yancey, opposing in the Alabama Convention a proposition to submit the ordinance of secession to the electors, spoke as follows: "This proposition is based upon the idea that there is a difference between the people and the delegate. It seems to me that this is an error. There is a difference between the representatives of the people in the law-making body and the people themselves, because there are powers reserved to the people by the convention of Alabama, and which the General Assembly cannot exercise. But in this body it is all power, no powers are reserved from it. The people are here in the persons of their deputies. Life, liberty, and property are in our hands. Look at the ordinance adopting the constitution of Alabama! It states 'we the people of Alabama,' etc., etc. . . . All our acts are supreme, without ratification, because they are the acts of the people acting in their sovereign capacity."[1] The conventions of several States (Alabama, Louisiana, Arkansas, Missouri) acted in conformity with this theory. Elsewhere, as for instance in Virginia, the ordinance of secession was submitted to a popular vote, but only long after the convention, legislature and governor had transformed the measure into an accomplished fact.[2]

It is not difficult to understand why, after the victory of the North, the "reconstruction" bills imposed the principle of popular ratification upon all Southern States without exception. To the teachings of history was added a practical consideration of equal importance, — the necessity of giving the new constitutions the support

[1] *The History and Debates of the Convention of the People of Alabama*, p. 114.

[2] Cf. Von Holst, Sybel's *Historische Zeitschrift*, XXXII.

of the votes of the negroes who had just been enfranchised.

A single modification has been made by the most recent constitutions, in the provision established in 1846 by the constitution of the Empire State. The double consultation of the legislature upon plans of partial revision has been suppressed. It has become apparent that reliance can be placed upon a single vote of the houses, as the Portland convention, which drew up the Maine constitution, had judged. On the other hand, the condition of a two-thirds majority has been re-established, as was provided in that document.[1]

Finally, we must mention here an attempt made in 1872 by the New York legislature, and imitated in 1873 in Michigan, in 1875 in Maine, and in 1881 in New Jersey. In these different States the governor was charged by the legislature to appoint a certain number of persons to form an extra-parliamentary committee on the constitution. To these committees was given the task of framing amendments and reporting on them to the legislatures. The latter, with the exception of the General Assembly of New Jersey, which has never followed this extraordinary procedure, discussed the reports and used them in formulating certain amendments, which were submitted to the people.

The constitutionality of this mode of procedure may be questioned. It seems to have been abandoned and, at any rate, does not seem destined to spread widely, at least under the form which has been given it in the States which have tried it. If the legislature discusses anew

[1] See the California constitution (1879) reprinted in Bryce (*The American Commonwealth*, Vol. I.), and abridgement of the constitutions of the two Dakotas, Washington, and Montana, admitted into the Union in 1889, in Appleton, *Annual Cyclopedia*, 1889.

and remodels the propositions of the committee appointed by the governor, the latter takes the place of a parliamentary committee, and the reason for such a body is hard to find. If, on the other hand, the legislature thinks itself bound to ratify, without alteration, the plan submitted, and in turn to submit it to the people, — something which has never happened, — the extraordinary committee is substituted for the legislature in the exercise of constituent initiative, and in that case it certainly becomes unconstitutional.[1]

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[1] Cf. Jameson, §§ 570, 546.

CHAPTER VIII.

THE AMERICAN SYSTEM.

THE constitutional system whose origin and development in the different States of the Union we have just traced, may be summed up in the formula: the sovereign people itself establishes its constitution.

This act of supreme power has reference only to the final decision, to the approval of a plan the framing of which belongs either to the ordinary legislative power or to a convention specially chosen for the purpose. In the latter case, the preliminary question as to whether such an assembly is desired or not is put to the sovereign itself, and is answered by a popular vote. This mode of amending constitutions is employed more particularly in cases of total revision. As we have seen, it was the first to arise. It has remained the common-law method, the one to which recourse may always be had, even if not prescribed by an article of the constitution, even if the constitution provides only for legislative initiative. The example given on this point by the State of New York, in 1845, was not lacking in precedents. It has been so often followed that it may be said to have become one of the principles of the unwritten public law of the United States. American statesmen hold that no special provision can invalidate the fundamental right recognized and guaranteed to the people by the declarations placed at the head of their constitutions, and formulated for the

first time by the Virginia Bill of Rights of 1776, in these words: —

" . . . When any government shall be found inadequate or contrary to these its purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."[1]

This view has been confirmed by the decisions of several Supreme Courts.[2]

The provision of the constitution of New York, that the people be consulted every twenty years upon the question of calling a constitutional convention, has been reproduced only in Ohio, Maryland, and Virginia. The clause of the Michigan constitution, made in imitation, fixed the period at sixteen years, while in Iowa, the periodical popular vote has likewise been adopted, but with an interval of ten years. The plan has been rejected by all the other constitutions. The aim of those who advocate it is to give the people an opportunity to take a direct part in exercising the initiative in constitutional reforms without the intermediate step of an election of representatives who shall decide whether revision shall or shall not be undertaken. It would be wiser to permit recourse to a popular vote at any time, as is the case in Switzerland, upon a petition supported by a sufficiently large number of voters. In this way the consultation of the electors would take place whenever the need of it was really felt, and would

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[1] Virginia Bill of Rights (June 12, 1776), Art. III. Poore, *Charters*, II. 1909.

[2] Cf. Wells *v.* Bain, 75 Pennsylvania St. 39. Stowe, J., Wood's Appeal, 75 Pennsylvania St. 49. Collier *v.* Ferguson, 24 Alabama, 108.

not be left to the chance of dates chosen arbitrarily. The New Hampshire constitution has preserved, since 1792, its popular vote every seven years, but this is the only one that has not given the legislature any part, either in proposing or adopting amendments to the constitution. Under the circumstances, it is natural that a provision which keeps the way of progress always open has been maintained.[1]

From the necessity in which the American constitutional convention is placed, of submitting its plans to the people, results the important characteristic which distinguishes it from most European assemblies with which one might be tempted to compare it, viz.: it is not sovereign. It is merely a committee on the constitution, charged with the preparation of an instrument to which the approval of the people can alone give the force of supreme law. It cannot even be said that this committee possesses, as a rule, a full and complete constitutional initiative, for very often its power is limited by the act by virtue of which it is elected.

We have seen that the contrary doctrine has been maintained. Such was the theory of the secessionists, but before it had been formulated in the revolutionary councils of the South, it had made its appearance here and there in the conventions of certain Northern States: —

[1] Till very recently Kentucky was, in relation to the incompetence of the houses, in the same condition as New Hampshire. It was not until 1890 that it permitted the exercise of legislative initiative in cases of partial revision. Since 1879, the proposal to call a convention has four times been rejected by the people. A majority of the whole number of legal voters and not of those actually participating in the vote was required for adoption, a condition which, considering the number of abstentions, is always a very restrictive one. With Indiana and Oregon, where a similar majority is required for the ratification of amendments, New Hampshire and Kentucky are, as might be expected, the States whose original constitutions have been the least changed.

"Sir, the people are here themselves. They are present in their delegates," declared Livingston in the Albany convention of 1821, and in a burst of eloquence altogether tropical, exclaimed, "Sir, we are standing upon the foundations of society. The elements of government are scattered around us. All rights are buried, and from the shoots that spring from their grave, we are to weave a bower that shall overshadow and protect our liberties."[1]

Still more distinctly but with less vehemence, Mr. Peters, delegate to the Illinois convention, expressed himself in 1847:—

"We are the sovereignty of the State. We are what the people of the State would be if they were congregated here in one mass-meeting. We are what Louis XIV. said he was, 'We are the State.'"[2]

These theories have often been refuted by the legislatures of different States, and annulled by the courts themselves. To-day, it may safely be said, the question is solved. Except in case of urgent necessity, justified by one of those revolutionary crises in which force necessarily has precedence over law, no convention in America would dare arrogate to itself the sovereignty of the people, the exercise of which belongs to the electors, and to them alone.

In the United States, the constitutional convention acts within the limits of its mandate. The legislature is the permanent representative of the people. The convention is a special committee of delegates. These delegates may have received, in general terms, the command to revise

[1] Proceedings and Debates of the Convention of 1821, p. 199.

[2] Illinois State Register of June 10, 1847. Jameson, Ibid. § 308.

the constitution. In this case they are free to submit to the electors whatever plan they may deem fit, provided this plan contains nothing contrary to the provisions of the Federal constitution. But they may also have been given the special task of revising only certain parts of the constitution. In this case, they are bound absolutely by the act of the legislature, which has specified the points toward which their activity may be directed, and in consideration of which the people have conferred upon them their mandate. Their full power extends to this point and no further. If they were to go beyond it, they would be placed in a position analogous to that of the legislator who has enacted a law contrary to the constitution. The legislature has received from the people the right to act within the limits traced by the constitution. Let it once pass these limits, and it ceases in so far to be a legislative power. The law thus made is without constitutional value and may be attacked in the courts. It is true that, in the case of a convention, the power which may legalize the transgression is close at hand. If the electors, called to decide upon the fate of a constitutional amendment proposed by an assembly which possessed no right to formulate such an amendment, sanction it, it becomes a part of the constitution. But that does not render the act by which it has been submitted to the people any less illegal. The legislature would have been justified in requiring the government, whose duty it is to conduct the voting, to refuse to take it.

"A convention has no *inherent* rights," we read in the preamble of a decision rendered by the Supreme Court of Pennsylvania in 1873; "it exercises *powers* only. *Delegated* power defines itself. To be delegated it must come in some adopted manner to convey it by some defined

means. This adopted *manner*, therefore, becomes the measure of the power conferred. The right of the people is absolute, in the language of the bill of rights, to alter, reform, or abolish their government in such *manner* as *they* may think proper. This right being theirs, they may impart so much or so little of it as they shall deem expedient. It is only *when* they exercise this right, and not before, they determine by the mode they choose to adopt, the extent of the powers they intend to delegate."[1]

Judge Jameson, in his learned work upon conventions, studies American jurisprudence from close at hand concerning the important question of the relations of a convention to the legislature which convokes it.[2] He pronounces categorically for the subordination of the former to the latter, without perhaps insisting sufficiently upon the reason for this subordination. Professor von Holst, whose remarkable works on the United States have brought him fame on both sides of the Atlantic, has accused him of having put a straight jacket on constituent assemblies, and of thus finding himself in contradiction with the spirit of the constitutional law of his country.[3] Jameson's reply has recently appeared in a revised and enlarged edition of his book. It is characteristic.

"But in politics, as in social life, there must be straight jackets, because in both men sometimes go mad. The convention system, as we know by bitter experience in 1861 at the South, went mad, and came near wrecking our ship of state. While, in some respects, that institu-

[1] Wood's Appeal, 75 Penn. St. Records, p. 71.

[2] Jameson, §§ 367–418.

[3] See his notice of Jameson's work in Sybel's *Historische Zeitschrift* (Vol. XXXIII.).

tion has proved itself to be all that Von Holst has painted it, in others it has been found to contain the elements of extreme danger. Shall no attempt be made to neutralize or eliminate these, provided those which make it 'one of the most imperishable and beneficent creations' of our political life can be retained and strengthened? A theory of the convention, which makes it the minister of the people, certainly does this; and a theory which converts it into the master, and the people into its slaves, as certainly robs it of all its beneficent qualities.

". . . That he (Professor von Holst) failed in some respects properly to appreciate those (American) institutions ought not to be deemed remarkable, when it is remembered that, before him, De Tocqueville also failed. That my critic must have failed, that his brief sojourn among us could not have fitted him to dogmatize in regard to the practical operation of the constitutional convention,— a perfectly unique institution,— seems to be certain, if the judgment pronounced by one of the most learned English historians, Mr. E. A. Freeman, is to be taken as sound. In a recent work that writer says: 'A Swiss or a Norwegian may judge of the workings of free institutions, because he, like the Englishman, has daily experience in his own land. But these things are mysterious to German professors, because they are mysterious to German statesmen also. The German scholar simply reads in a book of things which we are always looking at and acting in. He therefore utterly fails to understand many things at Athens or Rome or anywhere else, which come to us like our A, B, C.' After referring to Ranke and Curtius, as illustrating this general defect, he closes a high eulogium upon Mommsen with this statement of the points in which he fails as a historian: 'What is lacking in him (Mommsen) is political and moral insight which is born with a

man, the political insight which is gained only by living in communities of freemen.'[1] Where Curtius and Ranke and Mommsen failed to estimate correctly the simple and ordinary machinery of free communities, it can hardly be deemed remarkable, as we have said, that Von Holst should have misapprehended the novel and peculiar institution presented him for study among us."[2]

The method of partial revision, according to which the initiative belongs to the ordinary legislature, — a plan more expeditious than that which necessitates the calling of a convention,— confirms, however, none the less these general principles, since in both cases the real constituent action is taken by the electors, acting directly in their sovereign capacity. Upon the greater or less facility which it has been thought wise to give the legislature in instituting such action, depend those provisions which require sometimes special majorities, sometimes a double vote. Upon this point there is a tendency, similar to that which may be observed in Europe, for legislation to move toward further simplification of the conditions placed upon the legislature in the exercise of its initiative. When an American legislature decides to submit a constitutional amendment to the people, it is not using legislative functions, but it acts, as a convention, purely as a consulting body. Its members are no longer *representatives*. They are *delegates*.[3] True, it is not bound by the terms of a special mandate. But its power is limited by the constitution itself, which defines it. It can only propose one or more distinct amendments, but never a new constitution. Furthermore, in many States, since the

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[1] *Methods of Historical Study*, pp. 289–291.
[2] Jameson, Ibid. § 658 (Appendix C).
[3] Cf. Jameson, Ibid. §§ 548, 549.

establishment of the custom in a formal text by the Pennsylvania Convention of 1838, if several amendments are submitted to the people's approval at the same time, they must be so submitted separately. In several States, also, the alteration of two articles independent of each other may not be proposed in the same session. In Pennsylvania and in New Jersey it is unconstitutional to submit more than one plan of amendment during five years. In Tennessee the same system is in force, the period being lengthened to six years.

The purpose of all these restrictions, as is easily understood, is to render the popular verdict freer, more deliberate; to diminish, as much as possible, the influence which the power possessing the initiative might be tempted to exercise upon the decision.

In regard to the majority required for the popular sanction, one constitution only, that of Rhode Island, demands three-fifths of those who take part in the vote. Those of Indiana and Oregon require a majority of all the legal voters of the State. All the others are justly satisfied with a simple majority of the votes cast. The constitution of Indiana, which dates from 1816, underwent a total revision in 1851, and since then has been amended only twice, in 1873 and 1881. That of Oregon, established in 1857, was not revised until 1890. As to Rhode Island, the history of her constitutional crises should be pondered over by whomsoever may be tempted to disprove the affirmation of Daniel Webster, a statesman and jurist whose authority in the United States is only second to that of Marshall: —

"I know no principle that can prevent a majority, even a bare majority of the people from altering the constitution."[1]

[1] Debates and Proceedings in the Convention of Mass. 1820. p. 407.

Very few Americans suspect that the act by which they themselves exercise constituent power as voters is really a plebiscite. They are, as a rule, only called upon to use this power at general elections. The ballot which contains the list of the candidates of their choice registers likewise their decision upon the proposed amendment or the revised constitution submitted to them. This procedure as a whole has always been called an election. No one has ever dreamed of giving it another name, even when, as has only very rarely happened, no votes were cast. Mr. Bryce much astonished his American readers when he told them that they possessed an institution fairly comparable to the famous referendum in Switzerland.[1]

The study of the origin and development of the constitutional system of the republics of the American Union, in which we have just seen the important rôle played by the people, allows us to affirm two facts, which must not be passed over if we wish to see the significance of this system in the domain of comparative legislation. Firstly, popular ratification was at first practised by small bodies, — the town meetings of New England. It has gradually spread throughout the rest of the Union, growing, so to speak, with it, following step by step the progress of colonization, doubling, quadrupling, augmenting tenfold the number of its votes with the extension of the right of suffrage. And it is only recently, after this progressive initiation of the masses, in a country accustomed to local self-government, that it has been applied to great bodies of electors. Secondly, the reign of the people in consti-

[1] The astonishment of the American readers was probably due to their discovery of the referendum. It is only within recent years that the general public has become familiar with Swiss affairs, and curiosity was excited at seeing the well-known constitutional ratification applied to ordinary statute law. — J. M. V.

tutional legislation in America did not begin until thirty years after the close of the Revolutionary period. With the single exception of Massachusetts and the other colonies of Puritan origin, where the democracy of the town meeting had taken the lead in the movement which culminated in the Declaration of Independence, the States, both old and young, adopted the plan only when the form of their government, long since assured by the Federal constitution, had ceased to be questioned. These considerations enable us to understand why the republics of Latin America, which in so many other respects have imitated the institutions of the great Anglo-Saxon republic, have only in exceptional cases followed them in this particular.

APPENDIX.

THE STATES OF LATIN AMERICA.[1]

Two American confederacies, Mexico and Columbia, have adopted systems of constitutional revision more or less similar to that of the Federal constitution of the United States, with this difference, however, that in neither of these countries are the people consulted through the medium of special conventions. The State legislatures and the central Congress are alone called upon to participate.[2]

In Venezuela, the constitution of 1864, amended May 23, 1874, established in Art. 122 a similar procedure, but this document underwent a total revision in 1881. At that time the amendment clause was so changed that the initiative in constitutional measures, which had hitherto belonged to the Federal legislature, was transferred to the States exclusively (by a decree of a simple majority), while Congress was only given the right of approval.

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[1] It is, unfortunately, almost impossible to gain accurate information in Europe in regard to the frequent alterations made in the constitutions of South America. In this respect the best-equipped libraries, in Paris and London, are very defective and those of the legations, despite the courteous attention of those in charge, do not always supply this lack. The author would be particularly grateful for any information or corrections which his readers might be kind enough to send to him through his editors.

[2] Mexico, Constitution of February 12, 1857, Art. 127. Columbia, Constitution of 1863, Art. 92.

The object of this amendment was to check the dictatorial ambitions of the chief executives, who were always ready to use their influence over the members of the legislature to bring about changes in the constitution. This provision appears to have been particularly distasteful to the central authority. In 1891, Congress itself framed a new constitution, thus exercising the initiative "through the continuation" of the old law.[1] The States could not admit this pretension; they protested, and a civil war began. The constitution destined to put an end to this revolution has not yet been established.[2]

The Argentine Confederation has adopted the system of constitutional conventions. Article 30 of the constitution of 1860 provides that revision shall be made by a convention called for that purpose, after a parliamentary debate in which three-fourths of the members of Congress shall have declared themselves in favour of this measure.[3] This system resembles that in vogue in centralized, unified States.

In Nicaragua, the *reforma parcial* may be effected by two consecutive legislatures, by a majority vote and under a certain special procedure. The *reforma absoluta* (total revision) may be declared necessary by the legislature, but only a constitutional convention can effect it.[4]

The constitutions of Paraguay (1870), Guatemala

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[1] This is the characteristic expression used by General Guzman Blanco, the former dictator of Venezuela, who consented to be "interviewed," for the benefit of the reader, and to give us certain details upon a subject with which he is so perfectly familiar and upon which one might seek information in books in vain.

[2] The constitution of June 21, 1893, gives the initiative in revision both to the States and to Congress, but requires ratification by three-fourths of the legislatures.

[3] Argentine Confederation, Constitution of September 25, 1860, Art. 30.

[4] Nicaragua, Constitution of 1858, Art. 103.

(1879), and Honduras (1880) assign the duty of revision to constitutional conventions, convoked by a two-thirds majority of Congress, and limited in power by the decrees of convocation.[1]

The San Salvador constitution of 1883 was fashioned after the system which we have seen in operation in the States of the American Union, but with the total exclusion of the plebiscite. The proposed amendment, after having received a two-thirds majority of the members of each house, is published in the official bulletin and made an order of the day in the following legislature. If this legislature supports it, a constitutional convention is then called to pronounce finally upon it.[2]

In the republic of Hayti, constituent power is exercised by a Congress composed of both houses sitting together as a National Assembly.[3]

With the exception of Brazil and Uruguay, the other republics of Latin America give the right to amend to the legislature, by establishing special modes of procedure,— Peru here being excepted,— and by applying the principle of an appeal to the people at some stage of the constituent work,— Peru in this respect conforming to the general rule.[4]

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[1] Paraguay, Constitution of 1870, Arts. 122–125. Guatemala, Constitution of 1879, partially revised in 1885, Arts. 99–104. Honduras, Constitution of 1880, Art. 27.

[2] San Salvador, Constitution of December 4, 1883, Art. 133. Again revised in 1888.

[3] Hayti, Constitution October 9, 1889, Arts. 194–196.

These provisions were not inspired by the French law of February 25, 1875, as one might think. They date from the constitution of the Haytian Republic of December 30, 1843, before secession of the eastern part of the island which became, in 1844, the Dominican Republic. See Louis Joseph Janvier, *Les Constitutions d'Haïti*, Paris, 1886, p. 184.

[4] Peru, Constitution 1856, Art. 131. Costa Rica, Constitution 1871, Art. 134. Chili, Constitution 1874, Arts. 165–168. Bolivia, Constitution

The constitution of Equador, alone, requires simply a two-thirds parliamentary majority, given once for all, but it reserves the bases of its constitution, which may not be touched in any legal way.[1]

The imperial charter of Brazil, dated 1824, contained the articles which were inserted in 1826 in the constitution of Portugal.[2] The constitution of Uruguay, which became an independent republic in 1828, contains similar provisions, taken from the charter of Dom Pedro I.[3] The Brazilian constitution in force at present, which, as is well known, is federal, is in its main features copied from the constitution of the United States. It differs from the latter, however, in its amendment clause, which resembles somewhat the French constitutional law of February 25, 1875. Amendments are not presented either to the State legislatures or to special conventions. They are lawfully ratified by Congress, in three successive votes, by a two-thirds majority. The proposition must be signed by a third of the members of both houses.[4]

We are here brought face to face with a procedure necessitated by the difficulties of the political situation. After the Revolution which had brought it into power, the provisional government of Brazil intended at first to submit the Federal Constitution, which it desired to establish, to the people in the following way. The plan was

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of February 28, 1877, Arts. 132–135. Republica Dominicana, Constitution of November 17, 1888, Arts. 108–113. The constitution of 1844 reproduced, in its articles 202–204, the system of the Haytian constitution.

[1] Equador, Constitution 1861, Art. 132.

[2] See above, p. 92.

[3] Constitution of the Eastern Republic of Uruguay, September 16, 1829, Arts. 152–159.

[4] Constitution of the United States of Brazil, promulgated June 22, 1890, and ratified by the Congress, elected September 15, comformably to its provisions.

to be published, and for two months discussed in the press and on the platform. At the end of the two months this plan, amended or not, according to the indications of opinion, would have been decreed the provisional constitution of Brazil. The people, in electing their representatives to Congress, were to pronounce at the same time upon the constitution by yeas and nays. In case it were rejected, the Congress would have sat as a constitution-making body and been charged to frame a new one. The government, born of the revolution of November 15, 1889, was not long in becoming convinced that this programme was impossible of execution, and soon abandoned it.

The instability of most of the constitutions of Latin America has become proverbial. In several of the abovementioned documents the legislator himself has not feared to recognize this fact in a semi-official manner, in order to provide against trouble as much as possible. In Mexico, in Guatemala, and elsewhere, amendment clauses contain an article declaring that, in the event of a suspension of the constitution through an insurrection, it shall not thereby lose its binding force and shall be put into operation again as soon as circumstances allow.[1] The events of recent years have justified this foresight.

In the circumstances in which Spanish America is still placed, it is very natural that the influence of the institutions of the United States has not made itself felt more than has been shown in matters relating to the formation and revision of fundamental laws. Direct appeal to the voters through their primary assemblies has occurred here

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[1] "Esta Constitucion no perderá su fuerza y vigor, aunque por alguna rebelion se interrumpa su observancia," Constitution of Guatemala, Art. 104.

and there at certain times, notably in Nicaragua, San Salvador, and Honduras; but it could not become the rule. In a state standing on the eve or morrow of a revolution, appeal to the people, although theoretically justifiable by the principles on which the government is based, is rendered impossible by circumstances.

BOOK II.

FRANCE.

CHAPTER I.

THE CONSTITUTION OF 1791.

FRANCE has had eleven constitutions since the Revolution. Ephemeral and dissimilar regimes have followed each other in rapid succession. Nevertheless, the most completely developed administrative law yet known has become firmly established there, a governmental tradition has gradually grown up, and a French public law has been founded. It would be difficult to find a better illustration of the truth, so often lost sight of, that written constitutions are not the sole measure of the political institutions of a country, that they formulate rather than create, and that all constitutional rules are not to be found in them alone. The Declaration of the Rights of Man and the Citizen are not included in the laws of 1875. The Assembly of Versailles confirmed it by no decree. Yet who would dare assert that it is not a part of the present constitution of the Republic? Its principles permeate French legislation, dominate French public life. Its praises are sung on every occasion. It is quoted on the floor of the Chamber of Deputies and of the Senate. It is invoked in the courts. It is no longer the written law of France,

since the constitutions which proclaimed it have given way to another, but it is none the less the law of France; that law which she sent throughout Europe, with which her name has for a century been indissolubly linked by jurisprudence and history.

Article 3 of the *Declaration* of 1789 is as follows: —

"Sovereignty resides in the nation. No individual or body of individuals can exercise authority which does not proceed directly from it."

Art. 6. "Law is the expression of the general will. All citizens have the right to participate in its formation, either personally or through representatives."

At the time when the National Assembly adopted these principles almost unanimously,— principles so similar to those that had been proclaimed years before by the conventions of America, — it stood upon the very threshold of its labours. The transports of enthusiasm that burst forth on the night of the 4th of August still continued, and all difficulties seemed to be passing away. The discussions were relatively short. The members of the Assembly voted in accordance with the provisions of the *cahiers* which were the expression of the people's wishes.

It is hard to say, depending on the only existing reports of the session of August 21, when this article was adopted, what the Bishop of Autun, who proposed it, and the Assembly meant by the words "personal participation in the framing of laws." The provision was never discussed. Some possibly regarded it as only a declaration of the eligibility of all to legislative functions. But others certainly,— and they were in the majority,— regarded the "personal participation" as referring to the final adoption of the constitution. It must not be forgotten that this

was the Massachusetts system, with whose popularly ratified constitution the Assembly was familiar, and to whose influence the cahiers more than once bore witness.[1] It may be said that even if the Declaration of Rights, made under the spell of American ideas, does not determine the question of direct popular ratification of constitutional measures, it does expressly recognize it as legitimate.

Therein lay the theoretical solution, the rational statement of the principles proclaimed. When the Assembly was called upon in 1791 to apply them to the newly framed constitution, and to render the rights of the nation secure by a concrete text, it was seized with hesitation and doubt. Political preoccupations, anxiety for the morrow, had usurped the place of philosophical speculations and broad and general views. The Revolution had progressed. The king, arrested in his flight at Varennes,

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[1] *Cahier de la noblesse de Bugey*, pp. 8, 9. "In a monarchy, the sovereign is the nation, joined to the monarch and presided over by him."

"The sovereign power, being the exercise of the general will, cannot be restricted, limited, or delegated; since, though power can be delegated, will cannot. The States-General, not being the nation itself, but only its embodiment, is not invested with complete sovereignty. It is, nevertheless, clothed with exclusive power to consent to and to grant imposts, and to make new laws, *without possessing the right to prescribe those which shall serve as the basis of the social contract and the form of government, except with the express consent of the nation.*" (*Résumé général ou extrait des cahiers, pouvoirs, instructions, etc., remis par les divers Baillages, Sénéchaussées et pays d'États du Royaume, à leurs députés à l'assemblée des États-Généraux*, Paris, 1789, II. 29.)

Very many of the cahiers of the Third Estate had defined and formulated the theory of the constituent power of the nation: "Since the constitution, once adopted, must have authority over all parts of the kingdom and even over the States-General, the nation, which is the constituent power, can alone exercise, directly or through representatives chosen expressly for that purpose, the right to reform, improve, and change the constitution which shall be made by the impending States-General." (*Paris hors les murs*, p. 25, Ibid. III. 57.)

was the people's prisoner. His power was suspended. The monarchy was crumbling to pieces, carrying with it an entire regime. Men had wished to reduce its power, to limit it; they had not desired its overthrow. Below, the people were beginning to act. The resistless expansion of energies, kept in check by centuries of absolutism, was beginning to assert itself. Men dreaded, as something unknown, something terrible, this new power, which was thus let free and which no great national war had disciplined and chastened, as had been the case in America. Between the party of the emigrants, who had placed their hope in a violent reaction, to be effected with foreign aid, and the party of radical democrats, who were already talking of a republic, the constitution seemed, to those who wished to found a moderate monarchy, to be the only means of salvation, and they therefore strove with might and main to secure it against all the attacks which seemed to threaten it. Naïvely enough, they thought they could give it this security by simply declaring it unchangeable for a long period of time.

Article 2 of the third title had declared: "The nation, from which all powers proceed, can only use them through delegation." There was, then, nothing to fear from the primary assemblies. But the electoral assemblies, and especially the legislature, might attempt to use their prerogatives to bring about untimely changes. An amending procedure was therefore devised so long, so dilatory, and so complicated as to practically render revision impossible.

On the 29th of August Chapelier, presenting the report of the committees on the constitution and on revision, proposed that a date be fixed before which no amendments could be made. The year chosen was 1795 for the king and the legislature, the very year the Massachusetts con-

stitution had set for the appeal to the people regarding its own revision. For the citizens who might wish to petition for amendments, the year decided upon was 1796. In 1800 the constitution was to be examined by a constitutional convention, similar to those of the United States, which should effect whatever reforms should seem necessary. The preamble of the proposed decree echoes the well-known phrases of the American declarations: —

"Inasmuch as the nation possesses the inalienable right to revise, reform, and alter its system of statutes, and even its fundamental law, etc."[1]

A long discussion ensued, lasting till the 4th of September, which it is unnecessary to describe here, after Laboulaye's thorough and profound examination of it.[2] In vain did Malouet endeavour to convince his colleagues that the best way to secure stability and permanence for the constitution was to submit it to the primary assemblies, and thus attach to it "the real and undeniable majority of the nation."[3] This they believed would be dangerous. Nor did they see the necessity of it. Did they not themselves possess full constituent powers, and could they not *decree* stability and permanence? The Assembly found the dates chosen by its committee too early, and adopted an amendment proposed by Tronchet, providing that no revision of the constitution might be undertaken for thirty years. Then, as this amendment was too plainly in contradiction to the principle "of the inalienable and imprescriptible right of the nation," the Assembly, after showing its embarrassment by repeatedly

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[1] *Moniteur* (reprint), IX. 530 seq.

[2] See *Questions constitutionnelles*, Paris, 1872, pp. 164–185.

[3] *Moniteur*, August 31, 1791.

changing its mind and shifting its ground, adopted, out of sheer weariness and without discussion, the following title, proposed by Thouret in behalf of the committee: —

Title VII. On the Revision of Constitutional Decrees.

Art. 1. "The National Constituent Assembly declares that the nation has the imprescriptible right to change its constitution; nevertheless, believing that it will better conduce to the good of the nation if the right to amend those of its articles which experience may prove defective be exercised in the way prescribed in the constitution itself, it hereby decrees that these changes shall be made in the following manner.

Art. 2. "When three consecutive legislatures shall have declared uniformly for the change of a certain article of the constitution, the revision demanded shall take place.

Art. 3. "The next legislature and the one immediately succeeding it may propose no constitutional amendment.

Art. 4. "Of the three legislatures which may thereafter propose amendments, the first two shall consider this subject only during the last two months of their last sessions, and the third at the end of the first annual session or at the beginning of the second. Their deliberations upon this matter shall be subject to the same forms as ordinary legislative acts; but the decrees by which they express their desire for an amendment shall not require the approval of the King.

Art. 5. "The fourth legislature increased by two hundred and forty-nine members, chosen in each department by doubling the ordinary number of members furnished by each according to population, shall form a constitutional convention.

"These two hundred and forty-nine members shall be chosen after the election of the representatives of the legislature shall have taken place, and their summons shall be different. The constitutional convention shall consist of one chamber.

Art. 6. "Those members of the third legislature who may have voted for the change may not be elected to the constitutional convention.

Art. 7. "The members of the constitutional convention, after having taken the oath together to live as free men or die, shall then swear separately to restrict themselves to enactments upon those matters only which shall have been submitted to them upon the uniform demand of the three preceding legislatures; further, to maintain with all their power the constitution of the realm decreed by the National Assembly in the years 1789, 1790, and 1791; and in all things to be faithful to the nation, the laws, and the King.

Art. 8. "The constitutional convention shall then give its attention without delay to the subjects submitted to its examination; as soon as its work shall be completed, the two hundred and forty-nine members chosen in addition shall withdraw without participating in any acts of legislation whatever."

The course of history is a sufficient criticism of this system of revision. John Adams' constitution, which the French committee had in mind in its first plan, chose fifteen years as the date before which amendments might not be proposed. But this constitution had the support of the immense majority of citizens. The one which Louis XVI. was compelled to sign had not been submitted to the approval of the people, either directly, as Malouet had urged, or in any other way. According to the arti-

cles given above, ten years at least would have been required for the proposal of an amendment, even were the greatest dispatch displayed and — what was almost impossible — were three consecutive legislatures to agree. On September 21, 1792, the first decree of the Convention swept away with a single stroke the constitution of 1791.

"The National Convention declares that there can be no constitution which is not adopted by the people."

This declaration was made unanimously and without discussion.

CHAPTER II.

THE CONSTITUTION OF 1793.

THE first committee appointed by the convention to draw up a plan for the constitution was composed of Condorcet, Gensonné, Barrère, Thomas Paine, Pétion, Vergniaud, Sieyès, and Barbaroux.

The names of Condorcet, the author of the *Lettres d'un Bourgeois de New Haven*,[1] the friend of Voltaire and Franklin; and of Paine, the celebrated American democrat, author of *Common Sense* and the *The Rights of Man*, and whom the *Pas-de-Calais* had sent to represent her in the convention, show what ideas were destined to dominate the labours of the committee. Sieyès remained in the background. Condorcet, assisted by Paine, was the soul of the committee. He was charged to make the report. The plan which he presented, and which has been called the *Projet girondin*, was the result of a systematic union of the principles of New England and those of the eighteenth-century French philosophy. In it we find Puritan democracy, only it is formulated by a savant and secularized by an encyclopedist.

The Girondist Plan concerning decentralization and local self-government is well known. In it primary assemblies take the place of town meetings.[2] After having

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[1] See *Recherches historiques et politiques sur les États-Unis, par un citoyen de Virginie, avec quatre lettres d'un bourgeois de New Haven sur l'unité de législation*, Paris (*Collé*), 1788.

[2] A curious plan for a constitution, presented to the convention in

declared that the people "possess the right to revise, reform, and change their constitution at any time," "that one generation has no right to subject future generations to laws made by itself," Condorcet, upon the strength of the information he had received, constructed a scheme of revision similar to the one destined to develop later in the United States and to become the American system. The primary assemblies are to be consulted in regard to the calling of a convention. If the reply is in the affirmative, elections are held. The convention is charged with the elaboration of a plan to be submitted to the people; it possesses no other attributes. "The purely theoretical function of examining a constitution, of revising it and then presenting it for acceptance to the people, it being till then merely a work of philosophy, has nothing in common with, nothing which can confound it with the active function of enacting laws of detail, provisionally binding, and of passing general measures to be put into execution at once." [2]

This is the contribution of Puritan democracy.

To philosophy belong other provisions by which popular initiative in constitutional matters is organized. Fifty citizens may propose revision in the primary assembly to which they belong. If their proposal is adopted, the primary assemblies of the *arrondissement* are convoked, to deliberate in regard to the matter. If the result is favourable, the primary assemblies of the department are called together, and if the majority of these demand the

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June by Baraillon, representative of the Department of Creuse, and who evidently was an advocate of this system, translates literally the word *township* and speaks of *cités* assembling twice a year for elections, etc. (Art. 1, § 9.) This document may be found in the Bibliothèque Nationale (*Pièce Le* 38, 270.).

[2] *Moniteur*, XV. 471.

convocation of a convention the legislative body must then consult the nation. The legislature may, moreover, take the initiative itself in regard to this consultation. If the primary assemblies pronounce themselves in favour of a convention, the legislature designates the place where it shall be held, which must always be more than fifty leagues from the place where it is itself sitting.[1]

The Girondist Plan was reported to the convention February 15, 1793. The discussion, begun April 17, was constantly turned from its object. "I demand," cried a member in the session of May 27, "that it be shown in the minutes that we never discuss the constitution but some one seeks to distract us by raising side issues."[2]

This *some one* was Robespierre. On the 31st of May, at the instigation of the Jacobins, the convention was invaded by the armed ruffians of the suburbs, and on the 2d of June the arrest of the leading Girondists was decreed.

"It is the Mountain that will make the constitution," Marat had cried in his paper the day after Condorcet had made his report.[3] As soon as the convention was purged, the Committee of Public Safety, to which Hérault-Séchelles, Ramel, Mathieu, Couthon, and Saint-Just were specially added, was ordered to report a plan for a constitution to the Assembly within a week. The committee went to work. The secretary, Hérault-Séchelles, thought it wise to ask the librarian of the Bibliothèque Nationale to send him at once a copy of the "Laws of

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[1] The text of Condorcet's plan may be found in the *Moniteur* (reprint,) Vol. XV. 473 seq. The speech delivered in the session of February 23, in behalf of the committee on the constitution, is given on p. 456 seq.

[2] Buchez et Roux, *Histoire parlementaire de la Révolution*, XXVII. 254.

[3] No. 126, Ibid. XXIV. 305.

Minos." These laws of Minos played a very great rôle in the speeches of the Jacobins. They had the immense advantage of offering free scope to the orator's imagination and of saving him from contradiction. No one had ever seen them, but no one ever questioned their existence. And that was enough. Hérault-Séchelles' only error lay in his seeking information in regard to them.

Moreover, there was no need of many documents for the work to which the committee gave itself. Condorcet's plan was simply taken up and rechristened. Certain of its features were abridged and altered to suit the ideas of Robespierre. In the chapter on national assemblies the distinction between a constitutional convention and the legislature was swept away. Robespierre would not admit that there might be a difference between the special delegates and the ordinary representatives of the people, declaring that "a people which possesses two kinds of representatives ceases to be a single people." The passion for brevity, united with the desire to bind the legislature as little as possible by the constitution, occasioned numerous suppressions which were not always in the line of simplification. This may be seen by the articles relating to revision, which are not applicable without the intervention of organic laws of equal importance, and whose significance would hardly be apparent if one did not have in mind Condorcet's text:—

On National Conventions.

Art. 115. "If, in a majority of the departments, a tenth of the primary assemblies of each, regularly organized, demand a revision of the constitution or a change of any of its articles, the legislative body must summon all

the primary assemblies of the republic to pronounce upon the question of the convocation of a national convention.

Art. 116. "A national convention shall be formed in the same way as the legislature and shall possess the same powers.

Art. 117. "In matters relating to the constitution it shall treat of those subjects only which were given as the reasons for its convocation."

Hérault-Séchelles made his report on June 10. The debate upon it closed on the 24th, and the convention adopted the final text of the constitution. No article provided for its submission to the people, but that was regarded as a matter of course. The convention would have stultified itself had it withdrawn its work from the verdict of the primary assemblies.

The popular vote took place, and the result, announced on the 9th of August, was 1,801,918 in favour of acceptation, and 11,610 against it.

M. Taine has abundantly proved that the vote was not free.[1] Had he not done so, it might still have been inferred from the state into which the outrages of the 30th of May and the 2d of June had thrown the country, and from the violent dictatorship of the Jacobins. It is, however, none the less true that a precedent had been set which was destined to exercise an unmistakable influence upon the development of French constitutional law.

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[1] *La Révolution*, III., *Le Gouvernement Révolutionnaire*, Paris, 1885, pp. 11-16.

CHAPTER III.

THE CONSTITUTION OF THE YEAR III.

THE fate of the constitution of the 9th of August is well known. For two months it awaited its statutes of organization, and on the 10th of October it was virtually suspended by a decree proclaiming the government "revolutionary until the conclusion of peace." In the Year III., when Robespierre had been crushed at Thermidor, it occurred to the defeated party, struggling to regain its position, that the Republic possessed some laws. "Bread and the constitution of 1793" resounded through the suburbs of Paris and became the rallying-cry of the last of the Montagnards. Once more there were *journées*, once more the convention was invaded as in the halcyon days of club domination. It appeased the rioters by promising to soon publish laws for putting the constitution in operation. A committee of ten was appointed to frame them. This committee was authorized, in the course of its labours, to modify those provisions of the constitution which might seem to it to require amendment. It stretched the terms of its mandate and reported an entirely new plan, which, after two months' discussion, was adopted with some alterations. Such is the origin of the constitution of the Year III., which established the Directory and the two Councils of the Ancients and the Five Hundred. It was a compromise between the limited monarchy, which the National Assembly had tried to set up, and the republic, which the Girondists had dreamed of erecting, and which their rivals had tried to found upon terror.

"We have," said Danou, speaking of the Declaration of Rights, "removed from the Declaration of 1791 all its monarchical features and from the Declaration of 1793 all its elements of anarchy."

The conception of sovereignty is the same as in 1789, expressed in terms taught by the experience of the last few years: —

Art. 1, § 17. "Sovereignty resides in the whole body of citizens.

§ 18. "Sovereignty cannot be attributed to any individual or limited body of individuals.

§ 20. "Every citizen has an equal right to participate, directly or indirectly, in the enactment of laws, and the choice of representatives and public functionaries."

In regard to revision, the victors of Thermidor, though profiting by Condorcet's theory of the constituent power, fell back into the error of the National Assembly. They wrought out an elaborate procedure, which only resulted in barring the way to all reform. All amendments must be proposed by the Council of the Ancients and ratified by the Council of the Five Hundred. This ratification shall thereafter be repeated three times, at intervals of three years. At the end of the nine years an assembly shall be convoked, consisting of two deputies from each department. This assembly shall revise the articles imposed upon it by the resolution of the two councils, and shall then submit its work to the primary assemblies.

Title XIII. Revision of the Constitution.

Art. 336. "If any articles of the constitution shall prove unsatisfactory, the Council of Ancients may propose their revision.

Art. 337. "The proposal of the Council of Ancients

shall then be submitted to the ratification of the Council of Five Hundred.

Art. 338. "When, in the course of nine years, the proposition of the Council of Ancients, ratified by the Council of Five Hundred, shall have been repeated three times, at intervals of at least three years, a constitutional convention shall be convoked.

Art. 339. "This convention shall consist of two members for each department, elected in the same way as the members of the legislature and possessing the same qualifications as those required for the Council of Ancients.

Art. 340. "The Council of Ancients shall choose for the meeting of the convention a place at least two hundred kilometres distant from the seat of the legislature.

Art. 341. "The convention shall have the right to change its place of meeting, observing, however, the distance prescribed in the preceding article.

Art. 342. "The constitutional convention shall not exercise any legislative or administrative functions. It shall confine itself to the revision of only those articles of the constitution which have been remanded to it by the legislature.

Art. 343. "All the articles of the constitution, without exception, shall continue in force until the changes proposed by the constitutional convention shall have been accepted by the people.

Art. 344. "The members of the constitutional convention shall form one house.

Art. 345. "Members of the legislative body at the time of the convocation of a constitutional convention may not be elected members of the latter.

Art. 346. "The constitutional convention shall immediately submit its plan of revision to the primary assemblies.

"It shall be dissolved as soon as the plan has been thus submitted.

Art. 347. "The duration of the constitutional convention shall under no circumstances exceed two months.

Art. 348. "The members of the constitutional convention shall not be arrested, prosecuted, or sentenced at any time for anything they may have said or done in the exercise of their functions.

"During the exercise of these functions they may not be tried except with the consent of the members of the constitutional convention.

Art. 349. "The constitutional convention shall take part in no public ceremonies; its members shall receive the same salary as the members of the legislature.

Art. 350. "The constitutional convention may exercise the police power in the place where it may be sitting, or may delegate its exercise to others."

Eliminating from these articles the obstructive features borrowed from the constitution of 1791, we find here Condorcet's American system, with the difference that the primary assemblies in no case take the initiative in constitutional matters, and that they are not previously consulted in reference to the convocation of the constitutional convention.

The constitution of the Year III. was submitted to the people, and accepted by them by 1,057,390 votes against 49,977.

This time the vote was an honest one. No pressure was necessary to insure the adoption of the constitution. It replaced the revolutionary government by a legal authority, and seemed likely to put an end to the dictatorship of the Convention. This was enough to win for it the votes of the people, glad to be freed from the terror-

ists and fearing nothing so much as the despotism of the assembly and its committees. Even the monarchists accepted the constitution as furnishing the only means of a return to the reign of law.[1]

Unfortunately, the Convention could not persuade itself to surrender its power. It decreed that two-thirds of its members should be re-elected to the new legislature. This step was contrary to the spirit of the constitution. It was a purely arbitrary act, worthy of the regime which the Convention pretended to be bringing to a close. They thought it would be well to receive assurances from the primary assemblies, and they therefore decided to submit to them the "*Decrees of the Two-thirds.*" To compel the assent of the people, they submitted the decrees to them along with the constitution, without explicitly demanding a vote upon the former, and without warning them that silence would be interpreted as giving consent.

The Convention, proclaiming the result of the popular vote, announced that the decrees had been accepted. At Paris they had been unanimously rejected, and such was known to have been the case in a large number of provincial towns. The Convention was accused of having falsified the returns. The sections were in revolt. This was the signal for the famous insurrection of Vendémiaire,

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[1] Mallet-Dupan wrote to the Court of Vienna, August 23, 1795, as follows: "Those in favour of a moderate monarchy are increasing daily; they are attracting the patriots of 1789, very useful and numerous veterans whom the republicans have been trying to conciliate, but thus far unsuccessfully. All those in favour of a monarchy wish to see the new constitution put into operation, for two reasons: 1st, the test will immediately show the absurdity of the work and the necessity of revising it; 2d, because, under a positive and legal regime, revolutionary despotism will cease and the liberty of the press, of residence, of movement, of correspondence, things which are to-day very uncertain, will be rendered more safe." (*Correspondance avec la cour de Vienne*, I. 287.)

which Barras was charged to suppress, and which made the fortune of Bonaparte, upon whose talents he was compelled to fall back. The convention published a statement of the election, whence it appeared that the decrees of the 5th and 13th Fructidor had been accepted by 205,498 votes as against 108,784 in opposition.[1] M. Taine has suggested that these figures were really false. He based his belief upon evidence which he had collected in the national archives, in the folios relating to the vote of the Year III.[2] This supposition will probably be made a certainty by some new investigations recently undertaken. We are warranted in saying that the presumption is strong that the honesty of the Convention at that time suffered an eclipse. The decrees which its committee reported had been accepted by the primary assemblies had in fact been rejected.

The deception which was thus practised upon the Convention led it to two arbitrary acts, the appointment by decree of 104 of its members to seats in the new legislature, and the annulment, by the law of the 3d Brumaire, of a part of the elections of Year IV. The Directory sought authority in these examples for annulling, on the 18th Fructidor, Year V., the choice of royalists in forty-eight departments. On the 22d Floréal, Year VI., the councils declared 150 "demagogic" elections null and void. France was thus upon the high road of *coups d'états*.

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[1] *Tableau du dépouillement et du recensement du vœu des assemblées primaires et des armées de terre et de mer sur la constitution présentée par la Convention nationale à l'acceptation du Peuple français et sur les décrets des 5 et 13 fructidor soumis à sa sanction.* Printed by order of the Convention of Vendémiaire, Year IV.

[2] Ibid. III. 560 seq.

CHAPTER IV.

THE CONSTITUTIONS OF THE CONSULATE AND EMPIRE.

AFTER the 18th Brumaire Bonaparte took the place of the Directory and Councils. He inherited from the different Revolutionary assemblies the doctrine of national sovereignty. He adapted himself to the theory that makes the people the constituent authority, but as he proposed to be the first representative of the people, he arrogated to himself the right to present them with a constitution.

The constitution of the Year VIII., dictated to two committees appointed by the councils which had rallied to the support of the new government, was "submitted to the acceptance of the French people." It received 3,000,000 votes in its favour and 1500 in opposition.

The voting of the Year VIII. did not, like that of the Year III., take place in the primary assemblies, but in the capitals of the cantons, by signatures publicly inscribed in registers specially set apart for the purpose. This system, according to which a citizen must give his name at the same time as his vote, "with absolute liberty," but also, as Lanfrey says, "with the absolute certainty that neither the one nor the other would be forgotten,"[1] had been first proposed in France by Bourdon, at the time of the Revolutionary commune. It was the English system of poll-books, in which the electors of the cities and boroughs represented in Parliament were accus-

[1] *Histoire de Napoléon*, II. 42 (Ch. I.).

tomed to inscribe their vote whenever an election, ordinarily decided by a counting of hands, was contested by the interested parties. The First Consul knew how to use this system for his own advantage.[1]

The constitution of the Year VIII. contains no amendment clause. What indeed was the need of any? The principle of popular ratification was firmly recognized, and as far as the elaboration of documents was concerned France possessed in Bonaparte a permanent constitutional convention.

The first amendment was the consulship for life. Three and a half million votes were cast, in 1802, in favour of ratification. After this result had been declared, a senatus-consult was published, whose first article was: —

"The French people appoint and the Senate proclaims Napoleon Bonaparte First Consul for life."

Here the popular vote took on the form it had received, to a certain extent, seven years before, at the time of the adoption of the "Decrees of the Two-thirds," that is, it became more like an election. It lost its constituent and general character, and became exceptional and special. Thenceforward this character prevailed in most of the plebiscites of the Napoleonic period, to the detriment of national sovereignty. The extraordinary powers conferred by it were exploited by Napoleon to enable him to enact constitutional measures independently of it under the pretence of passing ordinary organic laws. This was true of the senatus-consult of the 16th Thermidor, Year X. (August 4, 1802), which profoundly altered the organization of the different powers, and which was not submitted

[1] This system was still applied in Virginia at the time of the popular vote upon the constitution of 1830.

to the people,[1] and even more true, if that be possible, of the senatus-consult of the 28th Floréal, Year XII. (May 18, 1804), decreeing the establishment of the imperial government. This "organic" senatus-consult, by which the Empire was founded, was not ratified by the people. The nation was consulted only in regard to "the heredity of the imperial dignity among the direct, legitimate, natural, and adopted descendants of Napoleon Bonaparte, and among the direct, natural, and legitimate descendants of Joseph Bonaparte and Louis Bonaparte."

Three and a half million votes were cast in favour of it. This time the affirmative vote was extorted. France had an emperor, proclaimed at Saint-Cloud the very day the Senate made its decree, an emperor who had signed "*Napoleon, the 28th Floréal, Year XII., of our reign the first.*" It was after this that the question of the hereditary transmission of the crown in the Bonaparte family was submitted to the people. There could be but one answer. The re-establishment of the monarchy being an accomplished fact, a vote against the hereditary transfer of the imperial dignity would have been a vote for civil war.

On the 5th of February, 1813, a senatus-consult determined the organization of a possible regency. The *organic* constituent power of a Senate "which did all that it was asked to do"[2] might be of some service to the triumphant and all-powerful ruler. It could, however, only be an additional element of danger in a moment of supreme difficulty. Napoleon had a chance to learn this in 1814.

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[1] This senatus-consult bestowed upon the First Consul the right of appointing his successor. The first election law for the popular ratification of the consulship for life — a draft drawn up by the Council of State — had provided that the right to choose a successor should likewise be asked of the people. Bonaparte rejected the second provision.

[2] *Mémorial de Sainte-Hélène.*

During the Hundred Days he reverted to the system of the Year VIII., even seeking to drive out of men's memories the methods of 1802 and 1804. The preamble of the *Acte additionnel* of 1815 comments thus upon the constitutions of the Empire: —

"Since we were called to power fifteen years ago by the wish of France, we have sought at different times to perfect her constitutional forms, according to the needs and desires of the nation, and profiting by the lessons of experience. The constitutions of the Empire have thus been wrought out by a series of acts which have received the sanction of popular approval." The Emperor added further: "Wishing, on the one hand, to preserve whatever is good and beneficial in our previous constitutional forms, and, on the other, to bring the constitutions of our Empire into entire harmony with the desires and needs of the nation and with the state of peace which we wish to maintain with Europe, we purpose to propose to the people a series of provisions tending to modify and perfect their constitutional acts, to surround the rights of citizens with all possible guaranties, to give to the representative system its widest development, to clothe the intermediary bodies with all desirable dignity and power; in other words, to combine the greatest political liberty and individual security with the strength and centralization necessary to make the independence of the French and the dignity of our crown respected throughout the world. In accordance therewith, the following articles, supplementing the constitutions of the Empire, shall be submitted to all the citizens of France for their free and solemn approval." The promised reforms were appended.

The new constitution, based upon the principle that the initiative in constitutional matters belonged to the

Emperor, contained no amendment clause. In other respects it mirrored the liberal ideas of its principal author, Benjamin Constant.

To regain France, Napoleon abjured his past. The *Acte additionnel* did not restore it to him, and that for two reasons, says Duvergier de Hauranne: the mention of the imperial constitutions previous to 1814, and its promulgation in the name of the Emperor.

Public opinion was more urgent than in 1804. It was no longer content to accept the Empire upon a more or less Platonic recognition of the sovereignty of the nation. Along with the sonorous and promising phrases of the preamble, it found certain disagreeable and offensive formulas against which it defiantly protested.[1] Government sought to correct this unfavourable impression by the decree of April 30, which convoked the chambers immediately, and gave the nation to understand that the new constitution would be revised, with the consent of her representatives, if such be her wish. The preamble of this decree gave as the reason for the Emperor's decision his desire not to prolong the dictatorship, with which circumstances and the confidence of the people had clothed him. It further declared that, if time had not been wanting, the *Acte additionnel*, instead of being submitted as a whole to the popular approval, would have been laid before the electoral assemblies of the departments for discussion. A second decree granted to the primary assem-

[1] A list of addresses, declarations, protests, etc., which followed close upon the promulgation of the *Acte additionnel* may be found in Duvergier de Hauranne, *Histoire du Gouvernement parlementaire en France*, Vol. II. Ch. VII. Its only defendants were found among the members of the old constitutional party, closely allied with Benjamin Constant. Among these may be mentioned Madame de Staël and Sismondi, who presented their plea in the *Moniteur*. Cf. Thiers, *Histoire du Consulat et de l'Empire*, Book LIX.

blies the election of the mayors and assistants in all the communes, where municipal offices had hitherto been filled by the prefect.

The only drawback to these undeniably liberal measures was that they put the new constitution into operation before it had been adopted by the nation. This time, it is true, the imminence of war and the necessity that the Emperor open the session before leaving for the army might excuse this reminiscence of 1804.

For a moment Napoleon might have thought that he had disarmed all opposition. Even Lafayette was satisfied, and expressed his willingness to be a candidate in the Marne elections. But the war of words continued in spite of the decrees, and throughout the country the prevailing sentiment was hesitation. The best proof of this was the result of the vote, only 1,305,206 in favour of the new constitution, and 4206 against it. The number of absentees was greater than in 1793, and the army had cast its vote solidly in the affirmative. Further, the system of public registers had been used, and, without going into the charge brought against the imperial government, of having fraudulently increased the number of signatures by causing the names of women, children, and foreigners to be inscribed, charges upon which the present is hardly qualified to pass judgment, it still appears very probable that, whoever was connected with the administration, either closely or remotely, was compelled to sign his name, or permit it to be signed, in the registers, which were open from the end of April till the month of June.[1]

The truth was that France had not voted. Such was the outcome of so many concessions, of so many promises.

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[1] See Duvergier, Ibid. II. Ch. VII.; and Henry Houssaye, *1815*, Paris, 1893, Book III. Ch. IV.

The despot was crushed under the weight of his own past. Seven weeks after the popular ratification had been proclaimed, the Emperor abdicated for the second time, not so much because he had been beaten at Waterloo as because the country was no longer with him to continue the contest.[1]

"I have been defeated not by the armies of the coalition," he said at Fontainebleau, "but by liberal ideas."

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[1] See Thiers, Ibid. Book XVI., and Duvergier, Ibid. III. Ch. IX.

CHAPTER V.

THE CONSTITUTIONS OF THE RESTORATION AND THE JULY MONARCHY.

SOON after Napoleon's first abdication, the Senate, convoked by Talleyrand, had drawn up a constitution calling to the throne "Louis Stanislas Xavier de France, brother of the late King." The legislative body concurred, and it was about to be laid before the people. Louis XVIII. refused to subscribe to it, but instead, remembering the ordinances of his predecessors, granted a charter, dated June 4, the year of grace 1814, "and the nineteenth of our reign." The result was the return of Napoleon and a second invasion. After Waterloo, the Chamber of Deputies discussed a new constitutional plan. The last article was as follows: —

"The present constitution shall be submitted to the ratification of the citizens, who shall be called upon to vote by secret ballot in their primary assemblies."[1]

Before the close of the debate the allies had returned to Paris, and after them came Louis XVIII., for twenty years King of France and Navarre, bringing with him his charter.

This charter, being a gift of the king, did not have to provide for amendments. The king had altered it in

[1] Plan presented by the Central Committee of the *Chambre des Représentants*, June 29, 1815, Art. 123.

1814, with no other advice than that of his ministers. After 1815, he had some doubts about this mode of procedure. The ordinance of the 13th of July, dissolving the Chamber of Deputies and establishing, contrary to the thirty-fifth and following articles, a provisional regulation for the elections, announced that, in the future, the legislative power would decide upon changes that might be made in certain specified provisions of the constitution. Article 14 announced the intention of the government to take the initiative in introducing a certain number of amendments to the above-mentioned provisions. The ordinance of September 5, 1816, removed this possibility. A law of June 8, 1824, passed under the inspiration of the Villèle ministry, established the complete renewal of the Chamber of Deputies every seven years, thereby modifying Art. 37 of the charter, which provided for the annual renewal of a fifth of the members. Everything tends to show that Louis XVIII. regarded this measure as a concession made by himself, of his own good will, and accepted by the chambers. Such, indeed, was the view held by the Comte d'Artois, who that very year was to succeed his brother. Charles X., as his later history showed, regarded the charter as a sort of good-natured gift bestowed by the prince upon his accession to the throne, and renewable by a royal ordinance. This opinion, legally just and politically absurd, cost him his crown.

After the July Revolution, the Chamber of Deputies, pretending to revise the existing charter, drew up a new one. This was accepted by Louis Philippe, and became the constitution of 1830. This charter was not granted by the king. It was a compact between the king and the representatives of the nation. Logically enough, it did not provide for its own alteration. It contained no

amendment clause, and, in fact, never underwent revision. The constitutional statutes enacted between 1830 and 1848, and notably the Regency Act of 1842, were in the form of organic laws. The only conclusion possible is that the compact was considered immutable.

At the beginning of the reign, and several times subsequently, the question of popular ratification was raised in the discussions of Parliament. Such a ratification, however, was not desired, because it would have affirmed the principle of national sovereignty, a principle upon which the July regime was not exclusively based. Guizot's utterances on this subject are important. Louis Philippe's minister has expressed himself very clearly in his Memoirs. "There was," he says, "both superficiality and confusion of thought in talking constantly of a throne surrounded by republican institutions as the best of republics. The monarchy which we were called upon to found was no more an elective monarchy than it was a republic. Led by violence to a violent rupture with the elder branch of our royal family, we appealed to the younger branch to maintain the monarchy by defending our liberties. We did not choose a king, we negotiated with a prince whom we found beside the throne, and who was alone able, by his accession, to guarantee our public law and the conquests of our revolutions. An appeal to popular suffrage would have given precisely that character to the reformed monarchy which we most desired to avoid giving it. For necessity and compact it would have substituted election. This would have been the triumph of the republican principle, using the check just administered to the monarchical principle to drive it out completely, usurping its place in the nation, while still parading under the cloak of royalty."[1]

[1] *Mémoires pour servir à l'histoire de mon temps*, Paris, 1859, II. 26.

CHAPTER VI.

THE CONSTITUTION OF 1848. — POPULAR RATIFICATION AND UNIVERSAL SUFFRAGE AT THE CITY HALL OF PARIS, FEBRUARY 24, 1848.

On the 6th of August, while Louis Philippe was still only the Lieutenant-General of the realm, Guizot received from a republican a kind of manifesto, in which were the following words. —

"Provided the Lieutenant-General shall propose to the Chamber of Deputies, this evening or to-morrow, a republican constitution under a royal form, and a Declaration of Rights, to be submitted to the communes for ratification by yeas and nays, within the next six months, the Lieutenant-General constituting meanwhile the provisional and authorized government, and,

"Provided the Chamber shall be dissolved immediately thereafter;

". . . We, republicans, promise to support the government to the best of our ability and power, and we will make ourselves responsible for the internal peace of the country."[1]

In 1842, in the course of the debate upon the Regency Act, Ledru-Rollin again demanded the consultation of the people.

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[1] Guizot, Ibid. 31 seq.

What the republicans desired under the July regime, they desired in the hour of their triumph. In 1848 they gave back to the nation the constituent power which the restored monarchy had taken from it, except that, owing to the change of circumstances, the consultation of the people necessarily took the form of a consultation of an assembly chosen by all citizens, without distinction of fortune or talent. The decree of February 24, which formulates the principle of this innovation, *universal suffrage*, an innovation of which the great majority of those who had just overthrown the monarchy had never dreamed, was born amid this confusion. This is a most important point in constitutional history, and one which we believe has not received the attention it deserves. We shall be pardoned, then, if we pause to discuss it, it being well worth the while.

Lamartine was the author of the first proclamation of the Provisional Government assembled at the City Hall after the abdication of Louis Philippe. The plan which he drew up was approved in its entirety by his colleagues. It contained the following provision: —

"The Provisional Government declares that the *republican form* of government is adopted provisionally by the people of Paris and by itself; but neither the people of Paris, nor the Provisional Government, pretends to substitute its opinion for the opinion of the citizens directly consulted in the *primary assemblies* as to the final form of their government."

At first, only one alteration was made in this proclamation. In the place of the words "republican form," Ledru-Rollin secured the adoption of "republic."[1] The manu-

[1] See Garnier-Pagès, *Histoire de la révolution de 1848*, V. 307 seq. (Ch. X.)

script was sent to the *Moniteur* press, then withdrawn, at the request of Pagnerre and Bixio, to be discussed anew. The reason assigned for this step — a reason which received the formal support of Dupont de l'Eure, Arago and Marie, and which Lamartine and Garnier-Pagès recognized as serious — was that the Government possessed no power to thus proclaim a republic. "Did it not fear that it would thus be substituting the will of a few individuals, of a fraction of the people at most, for the real legitimate sovereignty of the entire people? Did it not fear that it would thus usurp this sovereignty? Did it wish to rob the Revolution of the prestige and authority of principles?"

"I am as much a republican as you are," said M. Pagnerre to the members of the Government, "but do you not see that you are about to compromise, by precipitate action, the future of this republic which we wish to establish? Let the nation speak its will. Do not make the mistake that your July predecessors made."

The plan of the proclamation was therefore discussed again. Louis Blanc, Flocon, and Armand Marrast, who had just reached Paris, took part in the second debate. Lamartine presented the following wording of the above paragraph: "Although the Provisional Government acts solely in the name of the French people and adopts the republican form of government, neither the people of Paris nor the Provisional Government pretends to substitute its opinion for the opinion of the citizens of France, whose will shall be consulted as to the final form of government to be proclaimed by the sovereignty of the people."

Three different policies were advocated: 1st, the establishment of a Provisional Government, without deciding

in any way the question of the final form of government, that question being reserved for the free decision of the people; 2d, the immediate and unconditional proclamation of the republic; 3d, the proclamation of the republic *de facto*, with the full and complete reservation of the sovereign rights of the people. Dupont, Arago, and Marie favoured the first plan; Ledru-Rollin and Louis Blanc, the second; Lamartine, Crémieux, and Garnier-Pagès, the last. Marrast did not commit himself. The middle course was chosen, a compromise was formulated by Crémieux, aided by Lamartine, and was finally adopted unanimously: —

"The Provisional Government recommends (*veut*) the republic, subject to the ratification of the people, who shall be immediately consulted."

Instead of "The Provisional Government recommends the republic," Crémieux had written "proclaims the republic." This term having aroused determined opposition, Lamartine had found a word, "*veut*," "desires" or "recommends," which was unanimously approved.[1]

We have said that the idea of the government was to have the ratification of the people given by a national assem-

[1] Garnier-Pagès, Ibid. V. 348. Daniel Stern's report of the elaboration of this proclamation is somewhat different. We follow that of Garnier-Pagès, which in reference to the subject we are treating, besides being direct testimony, is also very detailed and substantially agrees with the depositions of Lamartine, Louis Blanc, and Crémieux. Moreover, the comments which the former member of the Provisional Government adds to the details we have quoted, seem to us a very reliable authority in view of the character which is universally attributed to Garnier-Pagès: "Such was," he says in closing, "the memorable debate. I have based my narrative scrupulously upon my notes and my own recollection and upon the recollection and notes of my friends." Garnier-Pagès, Ibid. V. 347.

bly chosen by universal suffrage; consequently, it decreed in the same session the dissolution of the Chamber, and announced the convocation of a national assembly, as soon as the "police measures necessary for the election should be taken."[1] Garnier-Pagès does not say why Lamartine's first idea was rejected and why the words *citizens consulted in primary assemblies* were suppressed in the second debate. In his narrative the poet himself forgot the terms of his first manifesto. He only mentions the second, and understands by a consultation of the people a consultation of an assembly elected by them, which is the official interpretation.

Whence comes this double omission? An admission made by Louis Blanc furnishes us the explanation. "Why envelop it in mystery?" he writes in his *Révélations historiques.* "In February, 1848, most of the departments were still in favour of the monarchy."[2]

If the Provisional Government entertained this idea, even though vaguely, at the time when it gave the proclamation its final form, — and it is significant that at that moment the author of the *Révélations historiques* was participating in the debate, — it of course could not think of appealing to the primary assemblies. A plebiscite would have been an immediate vote throughout France upon the form of government. If most of the departments were still monarchical, the Provisional Government not having time enough to make its influence predominant throughout the country, the republic which had just been recommended would have received a set-back.

This brings us to a consideration of the crisis through which the Provisional Government had passed since the first debate to which the manifesto had given rise.

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[1] Decree of February 24.

[2] *Révélations historiques*, II. 7.

As soon as it had met at the City Hall, the government appointed by the Chamber of Deputies had declared "that the republican form of government was provisionally adopted by the people and itself," because the insurgent mob, whose demands were for the moment orders, insisted upon the magic formula which it thought would put an end to all its miseries; but it had reserved for France the right to undo, should it think wise when order should be restored, that which it had been compelled to do by the pressure of circumstances. Such is clearly the thought of that phrase of Lamartine which we have just cited.

In order to show distinctly the uncertainty of the situation, the great writer did not hesitate to employ the words "provisional" and "provisionally" three times in two lines. And all the efforts of Ledru-Rollin to make the government's declaration more pronounced only effected the introduction of the word "republic" in place of "republican form." Then, no doubt, the violence of the people growing less, and its own hope of becoming master of the mob increasing, the government had wished to recede somewhat, and had withdrawn the proclamation from the printing office in order to remove from it the phrase which decreed the republic.[1] But, meanwhile, a new government had arisen, whose members, appointed in the office of the newspaper *La Réforme*, and taken up by popular acclamation, compelled the already constituted authority to recognize it. The latter, forced to share its power with men whose election was essentially as valid

[1] The order for this withdrawal, intrusted to M. Bixio, was signed by Crémieux, Lamartine, Dupont de l'Eure, and Garnier-Pagès (see Daniel Stern, *La révolution de 1848*). Note that in the statement we have made of this episode, following Garnier-Pagès, Ledru-Rollin is not mentioned as having adhered to the arguments of MM. Pagnerre and Bixio.

as their own, soon saw a resolute and vigorous Left gradually form in its midst. This group was composed of Ledru-Rollin, Louis Blanc, and Flocon, and later the workman Albert, whose name Louis Blanc had succeeded in getting enrolled by the side of his own upon the list of the Provisional Government.

In the preceding reform campaign, Ledru-Rollin and Louis Blanc had posed as champions, isolated indeed, but resolute, of the extension of the right of suffrage to all citizens. Placed in power, and standing at the head of a party which, speaking for the city of Paris, and still in arms and in control of the City Hall, might exercise a very considerable influence upon the decisions of the government, they did not formally demand universal suffrage; but at the very moment the proposition was made to consult the country upon the work of the Revolution, they declared themselves strongly in favour of the immediate proclamation of the republic. The unlimited extension of the right of suffrage was its necessary corollary.

By the time the manifesto which had been withdrawn from the printer was again taken up for discussion, the shifting to the Left of the majority of the Council was an accomplished fact, and the immediate triumph of the republic was assured.[1] The formula, which was signed by all,

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[1] As is well known, Marrast, Louis Blanc, and Flocon were first admitted to the Council as secretaries. The following day this title disappeared from the proclamations and decrees. Moreover, it was no hindrance to them as they had had the right from the very first to speak and act as active members of the Council. The following passage from Louis Blanc bears witness to this, agreeing perfectly in that respect with Garnier-Pagès' report. "All decisions were made by us all, after discussions in which we all participated upon a footing of equality. This, however, is saying but little. The two persons who in the evening of February 24, had the greatest influence upon the official and irrevocable

namely, "The Provisional Government recommends the republic under ratification of the people, who shall be immediately consulted," was at bottom, as events have abundantly proved, only the recognition of the final establishment of the republic. The form alone was a compromise.

If it was necessary, for the sake of the principle involved, to consult the country as to the form of government, it was also necessary to go about it in such a way as to allow sufficient time for the formation of an enlightened public opinion. There was only one way to postpone the hour of the nation's verdict, and that was to demand that decision not directly from the primary assemblies, but indirectly from a national assembly chosen by all citizens who might have been given the right to participate in the popular ratification. All the time necessary to organize a new electoral system, an operation whose protraction would depend upon the judgment of the Minister of the Interior, would thus be gained for the campaign before the country.

We will not say that this was the thought of all those members of the Provisional Government who adopted the plan of laying their work before an assembly chosen by universal suffrage; but, in any case, it must have been the idea of those who, like Louis Blanc, believed that four-fifths of the people of France were in favour of the monarchy, and who nevertheless made every effort, on the evening of February 24, to bring about what he himself calls "the official and irrevocable proclamation of the republic."

It was because of this situation that all mention of the primary assemblies was naturally suppressed without discussion, and that, at the same time, the principle of uni-

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proclamation of the republic were, as the following chapter will show, M. Flocon and myself, united with M. Ledru-Rollin." *Révélations historiques*, I. 84, Ch. III.

versal suffrage was substituted for that of an early popular ratification. This explains the tacit adoption of this principle, which was the rigorous, logical deduction of the premises of the Revolution, but which was, at the same time, big with consequences and well fitted to arouse opposition. We have no difficulty in understanding how the principle of popular ratification may have disappeared without leaving any traces behind it in the debate, after having brought forth universal suffrage, if we consider that the opposition between a representative system so thoroughly democratic and that of a direct and personal vote has only recently been made apparent by the experience of popular governments. Naturally enough, in 1848, this distinction escaped those who had just resolved to give political rights to all Frenchmen, a most extraordinarily democratic step for that time. In the minds of the members of the Provisional Government, the two ideas were exactly identical. They constantly employ expressions for the one which would be appropriate for the other.

"*The nation assembled in a constitutional convention shall itself decide,*" said Garnier-Pagès, in a speech to the people, February 25;[1] and Lamartine, after the close of his political career, spoke as follows of the first act of the Provisional Government: —

"To proclaim the provisional republic under the ratification of the country, to be immediately assembled in a national convention, was the only thing to be done which would be both revolutionary and conservative. For, on the one hand, a republic administered with unanimity and moderation during a certain period of time meant immense progress in the direction of rational government and popu-

[1] Garnier-Pagès, Ibid. V. 58.

lar interests. On the other hand, if this second republic, planned as a happy and brilliant contrast to the excesses and crimes of the first one, was to be repudiated later by the *assembled nation*, it, for a moment at least, gave the government, charged with saving the interregnum, the enthusiasm of the people, the active support of all republicans, the satisfaction of the unrest of the time, the astonishment of Europe, in a word, the inspiration, the impulse, and the force to cross the dreadful abyss of a revolution to a stable government."[1]

The principle of universal suffrage, once adopted for the election of a national constitutional convention, became necessarily the basis of the entire electoral system created by the new regime. In deciding upon the main features of the Cormenin-Isambert plan, on the 2d of

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[1] Lamartine, *Histoire de la révolution de 1848*, I. 267 (Book VI. Ch. VII.). This confusing of the direct expression of the will of the nation with its expression through a national assembly, chosen by universal suffrage, without the intervention of electoral colleges, had become so thoroughly rooted in the public mind, or, rather, the thought of distinguishing them was so far from occurring to it that we constantly meet in the writings of that day passages like the following, which we quote from a famous pamphlet: —

"The principal event of the day was the elections.

"For the first time universal suffrage was to be tried. That which our great revolutionary leaders had not dared to try, even in their most desperate moments, was to be our first step, our commencement. *The people no longer delegated their powers, but exercised them directly.* Between them and their representatives there were no intermediaries. They themselves chose the members of the assembly. The investiture thus given and received possessed a more solid and solemn character. A close bond was thus formed between the principal and the agent, and the powers which flowed from it were the truest expression and emanation of the sovereignty of all." Louis Reybaud, *Jérôme Paturot à la recherche de la meilleure des Républiques*, Paris, 1848, II. 61 (Ch. XVII.).

March, this convention registered an accomplished fact, and when, on the 28th of September, it adopted without discussion the articles of the constitution which definitely established universal suffrage, it confirmed a right which could no longer be taken away with impunity.[1]

The National Assembly, being summoned expressly to exercise the constitutional powers of the people, could not, of course, think of submitting its work to them. We could understand the rejection, October 23, of the motion of the citizen of Puységur providing for a direct consultation of the people, if several months previously the Assembly had not voted down the Grévy amendment and Parieu's proposition in regard to the presidency, and given to the electoral body the choice of the chief executive. They thus left the people without a legal way of refusing the new constitution, but at the same time gave them the means of overthrowing it by electing Bonaparte. And that is what they did.

Article 111 of the constitution of 1848, relating to amendments, was thus conceived: —

"When, in the last session of a legislature, the National Assembly shall have expressed the desire for a partial or total revision of the constitution, steps shall be taken toward this revision in the following manner: —

"The desire expressed by the Assembly shall become a final resolution only after three successive debates, held at intervals of a month, and decided by a three-fourths majority of the votes cast. The number voting must be at least five hundred.

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[1] This was only too well shown by the fate of the following legislature. The people had not demanded universal suffrage; but as soon as it was given to them, it became hazardous to tamper with it. There are actions that cannot be revoked.

"The constitutional convention shall be chosen for three months only. It ought to take cognizance only of the revision for which it has been summoned. Nevertheless, it may, in case of urgent need, enact necessary legislation."

Article 22 decides upon nine hundred as the membership of a constitutional convention.

These provisions reproduce in a somewhat milder form the slow processes of the constitution of the Year III., but they place a new and almost insurmountable obstacle in the way of the exercise of the right of initiative, by demanding a three-fourths majority of the votes cast, repeated twice. Here, again, events themselves proved to be the real critics of the system. The constitution of 1848 was overthrown by violence on the 2d of December, 1851, by a *coup d'état*, of which one cause had been the impracticability of effecting a revision legally.

CHAPTER VII.

THE CONSTITUTIONS OF THE SECOND EMPIRE.

FRANCE has always protested, sooner or later, in one way or another, against the omnipotence of assemblies. Louis Napoleon was popular at first, because he contended against an unpopular National Assembly. The majority of the nation was with him in this contest, and this majority was so determined to follow him, that unlawful and violent acts did not avail to alienate it.

The proclamation of the 2d of December called to mind in express terms "the system created by the First Consul, at the beginning of the century." But the subsequent decree, which summoned the people to meet in their assemblies, asked for power which the dictator of Brumaire, nearer the men and acts of the Revolution, had never requested. The Prince-President wished to be given power to establish a constitution upon the basis of certain specified institutions: a responsible executive chosen for ten years; a ministry responsible to him alone; a Council of State, charged with the preparation of and leadership in the discussion of laws; a legislative body and a Senate.

Seven million four hundred thousand votes, against six hundred and forty thousand, ratified the following resolution: —

"The French people desires the maintenance of the authority of Louis Napoleon Bonaparte, and invests him with the powers necessary to establish a constitution,

upon the basis outlined in his proclamation of December 2."

These figures cannot be regarded as absolutely reliable, for the voting was not free.[1] Nevertheless, as it took place by secret ballot, conformably to the principle laid down by the constitution of 1848, there can be no doubt that the majority really wished to vote in the affirmative.

The great objection that may be urged against this vote is to be found in the circumstances in which it was taken. Whenever a *coup d'état* has placed the destinies of a country in the hands of a single man, to consult the nation upon the maintenance of this man's authority is to ask a question already answered. A vote in the negative is a vote for civil war, and when the republic finds itself in this situation, the government is *revolutionary*, in the sense in which Robespierre used the word. The constituent power always resides *de jure* in the people, but is suspended, as it were, by a state of siege. The constituent authority, *de facto*, is the force which has made the *coup d'état*, or that which will make another to undo it.

It is hardly necessary to say that the form of the popular decree of 1851 possessed the exceptional character of that of the Year X., by virtue of which the consulship for

[1] "The voting took place without freedom of the press, or of assembly; the state of siege, declared in more than twenty departments, and the arbitrary power of the prefects prevailing in the rest having put an end to the freedom of the press, and that of assembly no longer existing after the passage of the law of 1849. The election had also been preceded by the imprisonment of most of the republican leaders or Socialist-democrats, they having been arrested in the different attempts to bring about an insurrection in Paris or in the provinces." — Faustin-Adolphe Hélie, *Les Constitutions de la France*, p. 1167.

life was established. Even from a purely formal point of view it was not a constitutional decree.

The constitution promulgated January 14, 1852, concentrates all authority in the hands of Louis Napoleon, chief executive for ten years, responsible to the people, "to whom he always has the right to appeal."[1] The preamble invokes the popular decree and the fundamental principles implicitly sanctioned by the popular vote. One cannot help noticing that the "exorbitant" powers, as M. Faustin-Adolphe Hélie calls them, which were bestowed upon the prince, were not anticipated in the manifesto of the 2d of December. The proclamation spoke of a "responsible," not of an absolute head of the State; it did not provide that the question of confidence could only be asked of the people, and that the initiative in it should belong to the interested person himself, a combination that robs the provision of all value.

The constitution of 1852 contained the following articles relating to revision: —

Art. 31. "The Senate may propose amendments to the constitution. If such a proposition shall be adopted by the executive power, it shall be decreed by a senatus-consult.

Art. 32. "Nevertheless, every modification of the fundamental provisions of the constitution, as laid down in the proclamation of December 2, 1851, and adopted by the French people, shall be submitted to a popular vote, based on universal suffrage."

These articles distinguish two kinds of constitutional provisions: the *bases*, the fundamental provisions laid down in the decree of December 2; and those not con-

[1] Art. 5.

tained therein. The former may only be modified with the consent of the people. In regard to the latter, by virtue of the extensive powers conferred upon Louis Napoleon, the initiative belongs within the legislative competence of his Senate and the final decision rests with himself.

This amending procedure corresponds in reality to that of the dictatorial period of the first Empire; but the men of that time, more respectful toward the theory proclaimed by the Revolution, had never divided constituent powers into two classes. Napoleon I. resorted to the fiction of "organic senatus-consults" for the constitutional laws passed by his Senate.

The first amendment to the constitution of 1852 was made in that very same year, in consequence of the following popular decree ratified by 7,800,000 votes: —

"The French people desires the re-establishment of the imperial dignity in the person of Louis Napoleon Bonaparte, with hereditary succession in the line of his direct legitimate, or adopted descendants. And it bestows upon him the right to regulate the order of succession to the throne in the Bonaparte family, as provided for in the senatus-consult of November 7, 1852."

"The voting took place," says M. Hélie, "by yeas and nays, on the 21st and 22d of November, under the provisions of the constitution of 1852, without freedom of the press or assembly, but with absolute liberty at the polls."

This is another of those arbitrary and autocratic coercions of popular approval, which have so discredited, in the eyes of French Liberals, direct appeals to the people. It is a transference of authority, not a constitutional act. A decree of this character may perhaps be compared with the

lex regia by which imperial power was formerly bestowed, but cannot be recognized as a modern constitutional law.

In 1866, a senatus-consult increased the constituent authority of the Senate and diminished the rights of the people.

Art. 1. "The Senate is the sole public power which may discuss the constitution, adhering to the procedure therein established.

"A petition, aiming at any modification or interpretation of the constitution, may be reported in general session only when its discussion has been authorized by at least three of the five committees of the Senate.

Art. 2. "All discussions aiming at modification or interpretation of the constitution and all publication, or reproduction of them, by the regular press or by placards or by irregular prints of the dimensions laid down in Clause 1 of Art. 9 of the decree of February 17, 1852, are forbidden.[1]

"Petitions asking for a modification or interpretation of the constitution may be published only in the official report of the session in which they are presented."

Thus the opposition was absolutely prohibited from bringing constitutional principles before the legislative body and before public opinion. "Perfectible by the free, spontaneous, exclusive acts of the Emperor and the Senate," said M. Rouher, in his statement of reasons, "the constitution remains above all individual controversy; it commands respect from all and imposes submission upon all."[2]

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[1] This article imposes a stamp tax of five centimes a sheet upon papers, appearing at irregular intervals, treating of political or economic questions, "if they are published in one or several numbers containing less than ten printed pages of from 25 to 32 square decimetres in size."

[2] Session of July 6, 1866 (*Moniteur* of the 7th).

Three years later Prince Jerome Napoleon said in the Senate: "Never has the constitution been more discussed than since the enactment of this senatus-consult."[1]

The Empire had encountered a movement of public opinion stronger than senatus-consults. On the 1st of January, 1867, Napoleon showed a desire to enter upon a course of liberal reforms, and we know what an evolution the imperial policy underwent, ending in 1870 in giving the *Acte additionnel* of 1815 a counterpart.

The constitutional amendments made by the parliamentary Empire were submitted to the people, and ratified by 7,350,142 votes against 1,538,825. The decree was as follows: —

"The French people approves the liberal constitutional reforms, made since 1860 by the Emperor with the concurrence of the great political bodies of the State, and ratifies the senatus-consult of April 20, 1870."

The voting took place on the 8th of May, with all possible provisions for secrecy and freedom. The action of the government, for the first time in the hands of a ministry responsible to the chambers, was limited to attempts to bring out a full vote; such, at least, was the formal assurance of this ministry to the legislative body. The instructions given the election officers were thus summed up by M. Émile Ollivier: —

"Secure and preserve absolute liberty everywhere. Do not use toward any one threats or pressure or promises or any of the forms of what has been called collective corruption. But do not forget that a practice which may confront you, is that of abstention from the polls. Now your

[1] *Journal officiel*, September 2, 1869.

duty as government officials, as the Minister of the Interior has said, is to be tireless in your attempts to bring every citizen to understand that his duty lies at the polls, that he ought there to express his opinion.

"Such is the mission with which we charge you, a mission for which we ourselves assume full responsibility. Urge the people to the polls, show them the seriousness of the act they are to fulfil, impress upon them the fact that the issue is between the autocratic constitution of 1852 and the liberal constitution of 1870, and that, in the interests of the future and the growth of free institutions, they must go to the polls, under the assurance, of course, that when once there they may express their opinion freely; such are the orders we have given our agents, and we now repeat them here."[1]

This time the Emperor seems to have come back to the normal type of popular participation in constitutional measures. He no longer demands from the nation, at least formally, a *carte blanche* or a crown, after having put the Republic into a state of siege. He now solicits a free and peaceful expression of opinion, a decision upon an impersonal question. And yet the appeal to the people has not entirely lost its autocratic character. As the reader has no doubt observed, the nation is not called upon simply to give or refuse its approval to the reform effected by the senatus-consult of the 20th of April. It must approve at the same time the constitutional measures of the Emperor and the legislative assemblies of the State since 1860. Its vote may be interpreted as a new consecration of the imperial regime. And so it will be. After his victory of peace the prime minister uttered this expression, which had its day of popularity: "This is

[1] Speech in the *Corps législatif* April 9, 1870 (*Journal officiel* April 10).

the revenge for Sadowa." ("*C'est la revanche de Sadowa!*")

For its system of revision the constitution of 1870 goes back to that of the *Acte additionnel.* Article 44 abolishes the authority of the Senate in constitutional matters, and restores to the people their full right of decision.

Art. 44. "The constitution may be amended only by the people, upon the Emperor's proposal."

The sovereignty of the nation being definitely recognized, the admission of the prince's right of proposal flows necessarily from the monarchical form of government. If it be admitted that the chief executive is the representative *par excellence* of the nation, it is natural to invest him with the initiative in constitutional matters.

When the popular vote of 1870 was being discussed, on the platform and in the press, the plebiscites of 1851 and 1852 were almost the only ones men thought of. They saw only the similarities between the old ones and the new, and took no account of the differences. The party of the opposition threw the odium of the former about the latter. Laboulaye paid dearly for his attempt to preach reason and to cite the example of America. The example was not wholly pertinent, as none of the republics of the Union had ever been placed in the position in which France then found herself, and the citizens of the United States had never been called upon to express themselves upon a constitution emanating from the executive. But Laboulaye was, nevertheless, perfectly right in distinguishing between 1870 and 1851. His friends would not heed him.[1] A few months later the German invasion and the collapse of

[1] Cf. Laboulaye, *Questions constitutionnelles,* Paris, 1872, p. 255 seq.

the scarcely inaugurated regime vindicated them in the eyes of the crowd. Since then the painful memory of defeat has become associated in the minds of Frenchmen with that of the last political act of Napoleon III., and all the attempts that have been made to show that the one was not the necessary consequence of the other have been without avail. In France there are some questions that are decided by sentiment, and which it is dangerous to try to reason about. The plebiscite of the liberal empire is one of these. It has been condemned, not judged.

CHAPTER VIII.

THE CONSTITUTIONAL LAWS OF 1875.

In the year 1871, what were the general principles of the public law of France concerning the establishment and revision of the constitution? A French jurist, had he had the leisure and mental composure necessary to examine this question from a theoretical, speculative standpoint, at the time of the meeting of the National Assembly at Bordeaux, would have found himself very favourably situated for the study of the customary law of his country. The constitution of the Empire was gone, that of the Republic was not yet made. History alone lay before him. A legal doctrine might be deduced from it, free of all accidental elements, detached from transient political conditions. This jurist might have said that three fundamental principles plainly issued from the precedents and documents, and might be considered established by the Revolution, and reaffirmed by all the regimes which, since 1789, had sought the source of their authority in the sovereignty of the nation.

France must have a written constitution, clearly differentiated from ordinary laws.

This constitution can only proceed from a constituent power which is superior to all constituted authorities.

Constituent power resides in the people.

The interpretation of the first two of these principles has never varied. The application of the third has changed with changing circumstances. The Assembly

of 1789 considered that the mission with which it was invested by its election, by the task imposed upon it in the *cahiers*, gave it the right to exercise constituent authority in the name of the nation. The convention declared that the primary assemblies only were competent to approve its work, which it on two occasions submitted to them. The National Assembly of 1848 thought it received from universal suffrage, established for the purpose of conferring it, the right of approval as well as the right of initiative. The public law of the two Empires, in its final form at the end of its evolution, recognized the chief executive as possessing the right of proposal, and the country, directly consulted, that of decision. But, with the exception of the period of the charters of the Restoration and the July monarchy, under none of the regimes born of the great Revolution had the supreme right of the people ever been contested.

The National Assembly which met at Bordeaux February 12, 1871, and decided, on the 10th of March, to postpone the questions relating to the form of government and to remove to Versailles, did not enact constitutional laws until four years later, in 1875. The majority desired the restoration of the monarchy. It was hardly possible for France to establish a constitution, before she knew definitely that she was not to have a charter. It was only when all hope of an immediate restoration had to be abandoned that the Assembly, yielding to the demands of the republicans, decided to act upon the organization of the public authorities.

Marshal MacMahon had been elected to serve for seven years as chief executive of a provisional republic, whose name the Assembly shrank from pronouncing. This septennial term was the point around which the politicians sought to rally the clashing ambitions. "Let the

future be wholly undetermined; let each preserve its own hopes and belief, but let all meet at this moment upon the common ground of the Marshal's powers," said M. de Ventavon, the chairman of the Committee of Thirty, charged with drawing up a plan for a constitution.[1]

Under such conditions, with a majority determined to frame only a provisional constitution, and endeavouring to give it an anonymous character, the unparalleled difficulties which the Assembly had to overcome in order to carry through the laws of 1875 are not surprising. We know how the word "republic" forced its way into the constitution, and was tolerated rather than established by a majority vote. The famous Wallon amendment, which called the chief executive *President of the Republic*, was adopted by 353 votes against 352.

Article 8 of the law of February 25 provides for revision as follows: —

Art. 8. "The Chambers shall have the right, in separate resolutions adopted in each by a majority vote, either of their own accord, or at the request of the President of the Republic, to declare that the constitution ought to be revised.

"After each of the two Chambers shall have passed this resolution, they shall meet together as a National Assembly, for the purpose of proceeding with the work of revision.

"The discussions upon the partial or total revision of the constitution must be decided by an absolute majority of the entire membership of the National Assembly.

"However, during the period determined by the law of November 20, 1873, conferring powers upon Marshal

[1] Speech, January 21, 1875 (*Journal officiel* of 1875, p. 566).

MacMahon, this revision may only occur upon a proposal made by the President of the Republic."

The predominant idea in the framing of this article was above all else political. The Left, as well as the Right, wished to render as easy as possible the future transition from the purely temporary regime which they thought they were founding, to the final, permanent regime which was the object "of the hopes and beliefs of all." The majority had a monarchy in view, and they prepared to present to a pretendent, whenever one should be found willing to accept the tricolour, a charter similar to the one which Louis Philippe had signed. The minority were resolved to establish a permanent republic.

Of these prepossessions, contrary in their points of departure but for a while similar in their effects, were born the above provisions. M. de Bousquet de Florian, who has devoted the most important part of his doctor's dissertation, recently presented to the Paris Faculty of Law, to the history and criticism of the law of 1875, speaks as follows: —

"No constitution ever saw itself so obliged to look forward to its early revision, and almost to declare itself temporary, in order to quiet doubts and suspicions; it was only voted on the condition that it might be early and easily revised. This purely political feature was the basis of all the discussions; there were no profound debates upon the question of principles; nowhere were the meaning and importance of the provisions of Art. 8 developed."[1]

All previous constitutional conventions had been resolutely intent upon securing permanence for their work.

[1] Bousquet de Florian, *Révisions des constitutions*, Paris, 1891, p. 85.

The Versailles Assembly had the opposite desire. The result was that it established one of the simplest modes of revision known in the countries where constitutional legislation is not, as in Prussia, assimilated with ordinary legislation. Without the necessity for repeated resolutions, extraordinary quorums, or special majorities, the chambers may decide that the constitution ought to be revised. This is evidently a step forward, demanded in France by her experience under all the different regimes. The resolution once adopted, the chambers meet in a congress, which takes the name of National Assembly, and there exercises sovereignty. But this simplification is gained at the cost of a severe blow to a French constitutional principle, the principle that constituent power belongs to the people, or rather — and this conforms better with the interpretation which the provision has received since the definite establishment of the Republic — is obtained under cover of a fiction. The National Assembly constituted by the union of both Houses, without the intervention of the country through elections, is regarded as exercising constituent power in the name of the people.

If we examine the attitude of the majority of 1875, which intended to use Art. 8 as the means for bringing about a monarchical restoration, we cannot doubt that they wished to dispossess the people of their constituent power. There was no place for the sovereignty of the people, as proclaimed by the Revolution, in the regime they wished to found.[1] The republican minority, who, because of the peculiar circumstances, were in the end

[1] The following proposition was laid before the National Assembly by the Duke de la Rochefoucauld-Bisaccia and sixty-five members of the Right, on the 15th of June, 1874: —

Art. 1. "The government of France is a monarchy. The throne belongs to the head of the House of France.

victorious, could entertain no such design; their very principles imposed upon them an interpretation of the amendment clause in harmony with the right they invoked. They fell back upon the postulate given above.

The constitution has been revised, both in 1879 and 1884, according to the procedure established by the Assembly of Versailles. The National Assembly of 1879 was only called to decide upon the transfer of the seat of public authority from Versailles to Paris. That of 1884 decided in regard to a certain number of amendments of little importance, proposed by the Ferry ministry, and made also this addition to the text of Art. 8: —

"The republican form of the government shall not be subject to revision."

This addition can only be understood in the light of the very peculiar circumstances under which the laws of 1875 were passed. None of them declared, positively and categorically, that the form of the government of France was republican. The monarchist party constantly asserted, and with a good deal of truth, that the purpose of Art. 8 of the law of February 25 was to permit a restoration in a legal way. The Assembly of 1884 wished to silence such assertions, and at the same time to incorporate in the constitution the fundamental declaration which it had not been able to insert in it in 1875.

There have been no other constitutional conventions. But numberless propositions to amend have arisen, and it may be said that since the constitutional laws were made, their alteration has been the subject which has most occu-

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Art. 2. "Marshal MacMahon assumes the title of Lieutenant-General of the realm.

Art. 3. "The political institutions of France shall be determined by agreement between the King and the representatives of the nation."

pied the attention of the republican Parliaments. In the course of the debates upon these propositions, numerous difficulties have arisen concerning the application of Art. 8. Several of them have been solved in practice; others still form the subject of parliamentary discussions. All these questions are treated in the dissertation of M. de Bousquet de Florian. The only one which seems to me to demand examination in a study of comparative legislation is that which treats of the powers of the National Assembly. It is the one which has raised, and still raises, the most heated controversy. The existence of the problem, and the ardour with which it is discussed, show very well that the fiction of which we have spoken is the weak point in the constitution of 1875.

Does the National Assembly exercise complete and unlimited constituent power, or is its competence restricted by the text of the resolutions of the chambers, by virtue of which it is summoned?

This question provoked a discussion in the Chamber of Deputies for the first time in 1882. Gambetta, then president of the Council, maintained that the powers of the convention were limited. M. Clémenceau maintained that they were unlimited. Since then the controversy has reappeared whenever a proposition has been made to revise the constitution. It has divided, and still divides, statesmen and jurists. Among the latter, M. Edouard Laferrière advocated the thesis afterwards defended by Gambetta, and gave his reasons in a legal opinion.[1] Professor Jalabert of the Paris Law Faculty expounds the same doctrine in his lectures. He bases his opinions upon the provisions of former French constitutions, upon the examples furnished by foreign constitutions, and particularly

[1] *L'art. 8 de la Constitution*, Paris, 1881.

upon the fact that the law of February 25, 1875, demands an agreement of both chambers for the convocation of a National Assembly, which presupposes a previous agreement upon the sort of activity this Assembly may enter into. Further, an examination of the present state of parliamentary jurisprudence shows that the chambers have almost always been opposed to the application of M. Clémenceau's theory.

On the other hand, the system which ascribes unlimited powers to the National Assembly is taught in the Faculty of Aix, by M. Félix Moreau. In a recently published work, M. Moreau argues that the resolutions by virtue of which the assemblies are called may only contain the words: "*The constitution ought to be revised.*" He does not mean, he explains in a note, that this is the only formula that may be voted by the chambers; but he considers it the most strictly in accordance with the law. As for the rest, whatever be the tenor of the resolutions of Parliament, he thinks that the Assembly is not obliged to conform to them in respect to the matter it will discuss. "It is inconceivable," says he, "that constituted authorities may limit the right of the constituent power."[1]

M. Moreau's argument would be unanswerable if the National Assembly were really the constituent power. But this power, as the author of the *Précis de droit constitutionnel* himself asserts in the opening of the chapter which he devotes to the subject, is the French people.[2] The assembly exercises constituent power only by delegation. It acts by virtue of a commission which it holds from Parliament. If it be admitted that Parliament is qualified to speak in the name of the people on this occasion, it must also be admitted that it may confer a limited

[1] *Précis élémentaire de droit constitutionnel*, Paris, 1892, p. 149.
[2] Moreau, Ibid. 133.

or an unlimited commission, according to its own good pleasure. If this be not admitted, the system erected by the law of 1875 falls to the ground. But if that be true, some one may say that the National Assembly is only the humble servant of the Parliament. In reality, the work of constitution-making is done by the legislature. This was the system in operation in a modified form under the last of the Bourbons and Louis Philippe, but which has never, under any regime, been that of French law. The result will be the assimilation of constitutional law and ordinary law. This, however, would be asserting too much. Certainly the Versailles Assembly of 1875 had no desire to establish the Prussian method, which it had just seen introduced into the legislation of the German Empire. It was for the purpose of maintaining the distinction between the constitution and ordinary laws that it gave the revision of the former into the hands of a special assembly. This assembly is bound, it is true, by the decisions of Parliament, but only with respect to the matters it may discuss. Further, universal suffrage wields a greater influence in the assembly than in Parliament, since the deputies, who represent the people directly, are more numerous in it than the senators. Finally, it must be taken into account that the Versailles Assembly endeavoured to give its work a provisional character. The house which they constructed was made for a future occupant, and that occupant was to be a parliamentary monarchy. The Republic has taken possession of it, and little by little has altered it to suit its own convenience. This required time. Not until 1884 did it put its name upon the door. It would be unreasonable to blame it for not having tried to replace all at once the foundations of the architect with others better fitted for a democracy. This might have undermined the whole structure, bringing it perhaps to ruins.

Whenever Parliament thinks the time is ripe for such an act, it may put an end to all the uncertainties and controversies about the attributes of the National Assembly by deciding that its amendments shall be submitted to the approval of the people. No article of the constitution provides for such a measure, but none forbids it. This will be neither the Napoleonic plebiscite nor the Swiss *referendum;* it will be the popular vote in vogue under the first Republic, with this difference, greatly in its favour, that the popular verdict will be given in a time of peace and under a regime which will have seen the rise of a new generation. Then a fundamental tradition of French public law, interrupted by peculiar political circumstances, will be renewed, and the difficulty which has resulted from this break will disappear.

Once let a constitutional law be submitted to the approval of the sovereign people, and the chief objection made against restricting the powers of the National Assembly by the resolutions convoking it falls to the ground. The assembly becomes, like the American convention, the people's committee on the constitution, and is no longer subordinate in any way to Parliament. The fundamental law regains its transcendent majesty. It is based upon a verdict from which there is no appeal.

One who has studied the contemporary history of France, however superficially, can hardly maintain that the direct exercise of the constituent power is not a part of the traditional law of that country since the Revolution. Not only has this essentially democratic institution, which France received from the first people to whose emancipation she contributed, become her own, but she has passed it on. Switzerland, the country of Europe where popular participation in constitution-making has reached its greatest development, received it from France.

BOOK III.

SWITZERLAND.

CHAPTER I.

THE REVOLUTIONARY PERIOD.

SWISS democracy, which has for several years occupied an important place in the writings of publicists, and which is beginning to gain the attention of statesmen in all free countries, flows from two different sources; on the one hand, from certain primitive Germanic institutions, preserved during the Middle Ages by the people of the High Alps; on the other, from the principles of the French Revolution, implanted at the close of the last century in the large cantons, and which have flourished in a soil long since prepared for them by the Reformation. These two sources, differing more widely from each other than the mountain torrent from the river of the lowlands, have finally merged together after overcoming many threatening and dangerous obstacles, giving rise to a rapid stream, whose waters, soon losing their separate aspects, now seem destined to flow, like the Rhone and Rhine, far beyond the confines of the land.

From the Germanic tradition proceeds the spirit of local independence, the "cantonalism"; from the Latin genius, the idea of unity. The contest between these two opposite tendencies has filled a century of Swiss history, and

still continues. The premature triumph of the latter gave birth to the indivisible republic of 1798, and the troublous period which was ended only by the mediation of Bonaparte. After 1814 and 1815 had brought about a sectional reaction, the awakening of 1830 prepared the counter triumph of the new ideas and the establishment of a Federal State, in 1847 and 1848. Finally, the constitution of 1874 marked a still further growth of the Federal power, and established an advanced democracy. Between the two, the best compromise then attainable was reached, on the basis of a considerable extension of popular rights.

The first *Helvetic Constitution* was drawn up in Paris, in Nivôse, Year VI., upon the model of the constitution of the Year III. The plan was elaborated at Bonaparte's suggestion, by a magistrate from Basel, Peter Ochs, then upon a mission to the French government. Ochs held conferences in regard to the matter with Lareveillère-Lepaux, Rewbell, and Daunou. His manuscript, after being sent to the Directory, was there revised, then translated into the three languages and circulated throughout Switzerland.[1] This constitution was willingly accepted by the emancipated peoples in the subject territories, and by a certain number of cantons. Elsewhere, particularly in the old republic of Bern and in the Waldstaetten, it was imposed by French arms, despite a desperate and heroic resistance.

Title XI. was as follows: —

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[1] The manuscript which was submitted to the Directory, and which served as original for the copy which was sent to the printers, is preserved in the *Archives nationales*. It shows numerous corrections in the hand of Director Merlin.

Changes in the Constitution.

Art. 106. "The Senate shall propose these changes; but propositions of this character shall become resolutions only after having been twice decreed, a space of five years intervening between the decrees. These resolutions shall then be rejected or ratified by the Great Council, and in case of ratification only shall be laid before the primary assemblies for adoption or rejection."

Art. 107. "If the primary assemblies accept them, they shall become a fundamental part of the constitution."[1]

These articles are plainly an advance upon the corresponding provisions of the French constitution of the Year III. Peter Ochs, who became president of the first Helvetic Senate, commented upon them in a speech delivered April 23, 1798. He declared that, in his opinion and that of his friends, the charter, which had necessarily been given to the country ready made, "was only to be a provisional constitution for five years."[2] This explains why the amending procedure, which was still so complicated in the model, had been simplified in the copy. The reader will note the complete suppression of the special assembly, to be convoked after the Council of Ancients has thrice ratified the proposed amendments in the course of nine years.[3] The councils are competent to submit them directly to the people.

The Helvetic Senate immediately appointed a committee to prepare a scheme of constitutional reform; but the

[1] Art. 32 established the principle: "The primary assemblies shall meet to accept or reject the constitution."

[2] See *Der schweizerische Republikaner*, May 5, 1798, a journal edited by Escher and Usteri, containing reports of the sessions of the Senate and the Legislative Body.

[3] Cf. above, p. 212.

interval required between the two debates, though very modest in comparison with the delays and adjustments of the French constitution, was soon found troublesome, and it was proposed, July 26, 1799, to ask the people to abrogate the unhappy provision.

"Either we have no legal means of procuring for ten years a better constitution," said the spokesman of the senatorial committee, "or it consists in asking the sovereign people in their next primary assemblies whether they will give us full power to present them with plans for revision, without regard to Title XI. of the present constitution."[1]

Direct popular government existed already in the small democratic cantons, whose citizens, meeting in *Landesgemeinde*, themselves exercised their sovereign rights in the old, time-honoured way. The popular vote in itself was for them no innovation, but only the application that was to be made of it. They hardly understood the necessity for a written constitution, and they were naturally displeased at seeing the unity of their sovereign assembly broken by the primary assemblies, the only system then regarded as practicable in a state of any extent. Among the large cantons, Bern and Zürich had organized, especially in the fifteenth and sixteenth centuries, so-called consultations of the people, *Volksanfragen*, in which the communes pronounced upon certain important questions, such as peace or war, adoption of the Reformation, etc. But this practice had fallen into disuse, and it was, moreover, a vote by corporate bodies, in which the votes of

[1] *Neues helvetisches Tageblatt*, July 11, 1799. In speaking of a minimum delay of ten years, the speaker interprets the Helvetic constitution in a sense favourable to his argument but not justified by the documents. The question was about a delay of five years only, as Peter Ochs had said.

individuals disappeared in the general answer of the commune. We may therefore say that though the popular vote introduced by the French Revolution might appear more natural to the Swiss than to the other nations of Europe, it was, nevertheless, a novelty.

When once the revision of the constitution was decided upon, those in favour of a centralized government, earnest advocates of the republic "one and indivisible," as well as the Federalists, defenders of the principle of cantonal autonomy, wished to see it replaced by an act of a purely national character. However, if all were agreed upon the principle involved, they were very far from unanimous in regard to the immediate necessity of carrying it out. The question which the Senate committee had proposed to submit to the primary assemblies was never laid before them, because the majority feared lest the reactionaries prove too strong.

Toward the end of 1799 began a series of *coups d'état*, and Bonaparte commenced to interfere actively in Swiss affairs. From that moment the Helvetic government became a model of instability. The Councils overthrew the Directory, and were then suppressed by the very executive committee which they had themselves appointed. Plans for revision became more and more numerous. In 1801, the First Consul presented to the Swiss deputies who had come to consult him the *Projet de la Malmaison*, selected from the plans which had been submitted to him, and to which he could give his consent. This plan, containing no mention of primary assemblies, was ratified by an extraordinary Diet. Unfortunately, this Assembly undertook to amend it. It was at once dissolved by the Federalists, with the aid of the French minister, M. de Verninac. Then the authors of this *coup d'état* framed a constitution, which was overthrown after

six weeks by those who favoured a centralized government, they, too, enjoying the support of M. de Verninac. This time an assembly of notables was convoked at Bern. It prepared and submitted to the people the *Second Helvetic Constitution* (1802). The ratification took place according to the system of public registers established in France after the 18th Brumaire. There were 332,048 qualified voters inscribed; of these, 72,453 voted for, and 92,423 against accepting the constitution. This was a check, but its authors had foreseen this possibility and had inserted in advance, in the summons to the electors, the provision that abstentions would be considered as tacitly expressing approval. Consequently, the 167,172 citizens who had not voted were counted as in favour of it, and the constitution having thus received "the approval of the great majority of citizens qualified to vote in Helvetia," was declared the *Fundamental Law of the Republic.*[1]

Several weeks later, all the French troops having been summoned back to Paris, Switzerland was thrown into violent civil war, and the mediation of the First Consul seemed to be, as Bonaparte himself said, the only means of safety in the general shipwreck.

Through the *Acte de Médiation*, of February 19, 1803, sixteen thousand Swiss were incorporated into the Consul's armies. He, in return, restored peace throughout the country. He re-established the old confederation, while at the same time preserving some of the chief conquests of the Revolution. This remarkable act, which was both a constitution and a treaty, was discussed and signed at Paris by the *Mediator* and by the Swiss delegates, and contained, of course, no amendment clause. This was also the case with the *Pacte fédéral*, which replaced it in 1815.

[1] Decree of July 2, 1802.

CHAPTER II.

THE DEMOCRATIC MOVEMENT OF 1830.

EACH one of the cantons that recovered their independence by the agreement of 1803, received its own constitution, the text of which was an integral part of the Act of Mediation. When they threw off Napoleon's thinly disguised protectorate, most of them hastened, in 1814 and 1815, to frame new constitutions. These were generally the work of councils more or less restored from the old regime, or of new assemblies, chosen by the privileged classes; the only exceptions to this were the little *Landesgemeinde* cantons, and the cantons of Graubünden and Geneva. In the two Unterwalden the constitution was adopted by popular assemblies. Glarus, Uri, and Schwyz simply made a digest of their traditional institutions, depositing copies of them in the archives of the Diet. In Graubünden the constitution was a real federal compact. The sovereign communes were called upon, in the manner usual among the old leagues, to ratify. At Geneva the citizens had for centuries been called in General Council to pass upon the laws and edicts of the Republic, hence the constitution with which the last of the Swiss cantons was to be received into the Confederation, was submitted to the people of Geneva "by reason of their natural rights."[1]

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[1] See the petition submitted April 22, 1814, to the Provisional Government (Rilliet, *Histoire de la restauration de la République de Genève*, p. 73).

The cantonal charters of the period of the Restoration as a rule make no provision for amendment, but in certain states they give the right of revision to representative councils, hedging it in with restrictive conditions, such as special majorities, repeated discussions, etc. With but few exceptions they all remained unchanged down to 1830. Just before this time a democratic agitation had begun in the cantons, which was to establish permanently the principles of the Revolution. For Switzerland, this movement marks the commencement of the modern era.

May 6, 1826, old Frédéric-César de la Harpe, one of the fathers of the Helvetic Republic, proposed to the Grand Council of the canton of Vaud that the charter established in 1814, without a consultation of the people, be revised. The only reply he received was a motion to pass to the order of the day. But the question had been raised. It reappeared in 1828 and in the following sessions. The councils of Lausanne, overwhelmed with requests and petitions pouring in from all parts of the canton, were soon compelled to undertake the task. On the 26th of May, 1830, upon the proposition of the Council of State, the Grand Council adopted a new and altered form of the act of 1814, embodying several liberal reforms. The exercise of political rights was granted to all citizens who could show a certain moderate property in real estate or mortgages, and the electoral assemblies chosen by them received the right to approve *in the future* all constitutional amendments. (Art. 38.)

This last provision gave rise to a long debate in the Grand Council upon the question of appealing to the people in matters of constitutional legislation. This gave Professor Monnard opportunity to cite the examples of Geneva, Graubünden, and the States of the American Union. The principle was admitted. After that it seemed only logical to lay

before the people the very plan then being discussed, but in vain did the minority of the committee appointed to examine it demand this. At the close of the discussion, a Councillor of State thus described the position taken by the government and the majority of the Assembly in regard to the constituent power which the Grand Council was then exercising. "For the present," it uses it "in the interests of the people. For the future, justly fearing the abuses which might spring from too great precipitation, and endorsing the true principles of the matter, which our Charter had perhaps not recognized, it renounces it in favour of the people."[1]

The canton of Ticino had a similar experience. A proposition to revise the constitution, presented to the Grand Council of the canton, in the session of 1829, was first rejected, then taken up again, under the pressure of public opinion, then ended June 23, 1830, in a new constitution, in which a generous recognition was given to democratic ideas.

Article 2 declares that sovereignty resides in the whole body of citizens. As in the canton of Vaud, the exercise of political rights is dependent merely upon a small property qualification, in either real estate or mortgages.

Article 46 provides that all changes in the constitution must be ratified by the people in their district assemblies, and Art. 48 provides that this article shall be put into force immediately. The voters of Ticino were accordingly convoked July 4, 1830, and voted, in all the districts but one, to accept the new constitution.[2]

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[1] Session of May 26, 1830 (*Bulletin des séances du Grand Conseil du canton de Vaud*, session of 1830, p. 234).

[2] As will be seen, it was the votes of the districts, not of the individuals, that were counted in the general result. We have here an intermediary form between the votes of communes, Germanic in origin, and the popular vote, of the Revolution.

Revisions were made in 1829 in Lucerne and Appenzell (Rhodes-Intérieures), the former being partial, introducing some liberal reforms into the aristocratic government of Lucerne, the latter being total, and increasing the powers of the *Landesgemeinde* of the little democratic State.

The progress of thought upon constitutional matters had likewise made itself felt in Zürich, St. Gall, and Geneva. And even the Federal Diet, that diplomatic assembly of ambassadors, was beginning to catch the sound of the people's demands.

"Our politicians are divided into two camps," said his Excellency, President Fischer of Bern, in his official report of July 5, 1830. "Some talk loudly of the defects of old societies, and expect, according to the theory of what they call the will of the people, or of that philosophic, ideal will which is supposed to be inherent in the social body as a whole, to abolish these defects and introduce a new and better regime by overthrowing old and venerable forms of government. Others believe in advancing more slowly and carefully, with experience for a guide, supplying little by little the deficiencies which it reveals and realizing one by one the reforms demanded by a progressive public opinion."

The President of Bern was one of the latter. "Constitutions," he added, "the product of the most profound study, compromises of discordant and conflicting rights and needs, the essential conditions of progress of civilization, have everywhere become the object not only of ceaseless scrutiny but of that criticism, dominated by the desire for something new, which seems to be characteristic of our century in all the domains of human thought. But it is, nevertheless, true that habit strikes far deeper roots in

man's nature than do abstract thoughts. It is not going too far, to say that nothing brings institutions, laws, and governments into greater disrepute than continual changes and revolutions. One has only to read the history of ancient and modern peoples, to find taught on every page and in every way the supremely important lesson that instability in the fundamental institutions of the State is the source of no good, but only throws the doors wide open to numberless evils. Far be it from me to seem by these words to blame what has occurred in several parts of our country. The thoughtful and sober way in which important changes have been made inspire the hope that they will satisfy demands that are very real or anxiety that is justifiable. May they endure, and procure the states concerned many years of prosperity! Every gain for the individual cantons is a gain for the whole country. But may we also escape the spirit of mad innovation, which might throw us into the whirlwind of excesses, whose evil effects we have had sufficient occasion to observe both at home and abroad."[1]

If we wish to hear the other side, this is what Zschokke said, in 1829, in a general meeting of the Helvetic Society: —

"The tendencies and aspirations of the great majority of the nation are plainly opposed to those of most of the State governments. While the latter, in order to meet the demands of their position, to defend their local interests, and secure the sovereignty of their particular States, are as mutually repellant as like poles, yet among the people the need and desire to turn the powers of the nation

[1] *Abschied der ordentlichen Eidgenössischen Tagsatzung vom Jahre 1830*, Litt. C. p. 10.

to national ends is becoming daily more apparent. While the governments wish to give free rein to their authority, the people dread uncertain and arbitrary power, and demand the defences of firmly established law. Those in authority do not conceal their distrust of the freedom of the press or their fear at seeing the citizens become familiar with public affairs. The people demand publicity and light. Those in authority desire trustful and silent obedience. The people wish to obey, but not blindly."[1]

Swiss affairs were in this condition when the July revolution broke out.

"Then during the hot July days," says Henne Am Rhyn, "we waited in vain for messengers from Paris, until one fine morning we saw the French mailpost enter Basel, flying the tricolour. The Bourbons had fallen, the king had fled, and revolution was master of Paris.

"The news produced an extraordinary commotion in Switzerland. We knew that the storm was about to break over us too, and we waited."

They did not have long to wait, but the storm, encountering no serious obstacles in most of the cantons, was not so terrible as men had feared it would be.

Almost everywhere great popular meetings were held. The leaders harangued the people. Resolutions were adopted and carried to the capital by delegates. Then, when it was necessary, for ordinarily a mere threat sufficed, arrangements were made to move *en masse* upon the seat of government, and the authorities were called upon to recognize the sovereignty of the people and to convoke a con-

[1] Heinrich Zschokke's *Rede an die helvetische Gesellschaft, zu Schinznach*, Aarau, 1829.

stitutional convention as quickly as possible, to revise the charter. There was some clashing of arms; but in general the rulers, not having permanent troops at their disposal, yielded without serious resistance. Then the citizens returned home; a constitutional convention was chosen; it prepared a constitution to be submitted to the people. While the convention was in session, popular meetings were held here and there, popular demonstrations continued, the object being to exercise pressure upon it. But when its work was completed, the citizens were called upon to vote upon it. It was accepted, and with the announcement of the result, the revolution was finished.

The people had fought and triumphed in Paris against a legitimate sovereign, a monarch who had at his disposal a well-disciplined army. The capitulation of four regiments, which were dispersed after the abdication of the king, bore witness to this victory. The rulers of the Swiss cantons, having in their favour neither divine right nor military force, had only the choice of abdication or submission. Resistance was impossible. They chose the latter alternative. That is the service which the July revolution rendered Swiss democracy.

The Federal Diet, having met in extraordinary session on December 23, 1830, adopted on the 27th the following decree, the delegations voting unanimously:—

"The Federal Diet unanimously approves the principle that each State in the Confederation, by virtue of its sovereignty, has the right to make whatever amendments to its constitution it may judge necessary and timely, provided they be not contrary to the Federal Compact. The Diet will, therefore, not interfere in any way in such constitutional reforms as have already been effected or are about to be."

Only in a few localities was the contest more prolonged and serious; in the cantons of Valais and Schwyz, which are divided into two distinct regions, one of which, formerly subject to the other, had remained in a state of political dependence; in Basel, where the city refused to concede equality to the citizens of the rural communes, although it had granted that right in 1798; and lastly, in Neufchâtel, whose sovereign was the King of Prussia, and who repressed the armed insurrection by force.

Ticino, which had already modified its institutions, made no changes, nor did most of the purely democratic cantons;[1] nor Geneva, whose constitution, adopted by the people, had been the object of progressive improvements since 1819.

In the course of the year 1831, Solothurn, Lucerne, Basel, Zürich, St. Gall, Thurgau, Aargau, Schaffhausen, and Bern, one after another, revised their constitutions in the way which has been described. Freiburg did the same, but the work of its constitutional convention was not submitted to the people. The canton of Vaud, finding itself distanced in the general onward movement by its confederates in German Switzerland, very soon overthrew its charter, which had already been revised but not confirmed by the people, and replaced it by a constitution, which received a popular ratification July 8, 1831.

All the new Swiss constitutions proclaimed the sovereignty of the people and with few exceptions, which quickly disappeared, the absolute abolition of all property qualifications for the exercise of political rights. Bankrupts and those supported by the public were alone disqualified.

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[1] Uri, Unterwalden, Zug, Glarus, Appenzell, Graubünden.

The people confided their authority to three powers, legislative, executive, and judiciary, which they carefully separated. In the great majority of cases, elections were direct, and offices were subject to periodical renewals at short intervals. The liberty of the press and the right of petition were guaranteed. The right of the nation to pass in last instance upon all constitutional matters was recognized.[1] In certain cantons the cities, formerly sovereign, preserved some advantage over the rural districts, in the number of deputies allotted to them in the representative assembly; but this last privilege, which nowhere, moreover, went so far as to make them preponderant, was not long in disappearing, like the others.

"The people," said Vulliemin, "hailed with joy the day that placed them, free and hopeful, under the protection of laws which they had themselves made and accepted."[2]

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[1] The constitution of Freiburg remained an exception in this particular down to 1857.

[2] *Histoire de la Confédération suisse*, Lausanne, 1876, II. 351.

CHAPTER III.

POPULAR REVISION IN THE CANTONS.—THE INITIATIVE.

THE principle that the constituent power resides in the people had gone down in the general wreck of the Helvetic Republic. We have just seen how it regained its place in cantonal public law. Henceforth, it is firmly, definitively established in Switzerland. History has only to record its subsequent development. But right here a new phenomenon presents itself, the date of which is important. Upon the old tree of liberty, planted in 1798, pruned by Bonaparte, almost completely cut down by the Restoration, then suddenly springing into life again in the sun of 1830, there were gradually grafted branches which it did not itself produce. The plebiscite, born of the Revolution, became united with old Germanic popular rights, which had been preserved among the little democracies of the High Alps. The institutions which have arisen from this alliance are those of contemporary Switzerland. They are the so-called *referendum*, or act of popular legislation, which we are not called upon to treat in the present study, and the *popular initiative*, whose wide extension in the field of constitutional legislation is the principal feature of the development of the constitutional law of modern Swiss democracy.

The right of initiative is the right to present to a political body a proposition, which the latter is obliged to act upon, either by adoption or rejection. In case of adoption, the project becomes the basis of a law emanating

from that body. This differs from the right of simple petition, out of which it grows, in that he who makes use of it participates by that very act in the exercise of the power which resides in the body in question.[1]

Initiative in constitutional matters is the right to lay a proposition before the constitution-making power, the acceptance of which will itself be an exercise of this power. The person or persons who exercise it take part in an act of sovereignty. In those constitutions which recognize that the people, directly consulted, are alone competent to confer constituent approval, initiative in constitutional amendments has sometimes been given to the executive power, but oftener to the legislature, or to the electors themselves.

In France, under the constitution of the Year III., this right resided in the representative assemblies; under the constitutions of the Empire, it was the prerogative of the chief executive. In the United States, the initiative, in cases of partial revision, belongs exclusively to the legislature, and in cases of total revision to the legislature and electoral body conjointly. In the latter case, it is true, a convention must be convoked, and the election of an assembly of this character can only take place by virtue of a popular vote, which must be called forth by the legislature.[2] Swiss democracy has in both cases turned over far

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[1] The initiative of representative bodies originated in England. At the beginning, as we know, the Lords and Commons had only the right of petition. Under the Tudors this right was transformed into that of the initiative. Since then these petitions have had the character of laws, and the royal power, formerly the sole seat of legislative authority, is now displaced in this field by Parliament.

[2] Those States must of course be excepted whose constitutions provide for a consultation of the people, at fixed periods, in regard to the convocation of a constitutional convention. When a convention is got together in this way, legislative intervention is not necessary.

the greater share to the people. In every case the representative bodies retain the right of proposal, which was naturally enough granted them. Everywhere they may undertake a partial revision, and may consult the people upon the question whether or not a total one ought to be attempted.[1] But revision, of whatever kind, may also be decided upon by the voters themselves, upon the demand of a fraction of their number, and without the intervention of the councils other than to appoint the time for the consultation of the people. And more than this, the constitutions of certain cantons, and, since 1891, the Federal Constitution, allow that a partial revision may be instituted directly by the collective action of a certain number of citizens.

Popular Initiative. — The cantonal constitutions framed in 1830 and the following years established representative governments of a more or less normal kind. Most of them, as for instance those of Zürich, Bern and Vaud, reserved all initiative in constitutional matters to the legislature alone. Others, however, in which it was possible to detect already the influence of the little neighbouring States, where pure democracy prevailed, granted this right to the people as well. In the cantons of Schaffhausen and Aargau, in the half-canton Basel-land,[2] a certain number of citizens expressing their wishes through a petition, or rather through a command in the form of a petition, might from that time forward, by demanding a popular vote, call forth what may be called the popular initiative in constitutional revision.

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[1] The Federal Assembly may even draw up a plan for an entirely new constitution, and submit it, on its own accord, to the Swiss people and the cantons.

[2] The reader is no doubt aware that Basel, Unterwald, and Appenzell are divided into half-cantons, each of which is a separate state.

Almost all of these constitutions set a time limit before which no amendments could be proposed. This provision caused trouble. In several cantons the people, basing their acts upon their possession of sovereignty, went beyond the law, by illegally revising their constitutions, despite these established delays. In those States where the councils had the exclusive right to the initiative and refused to exercise it, outbreaks occurred, at the end of which new authorities were improvised. Such experiences brought about the insertion of the following articles in the Federal Constitution, in 1848: —

Art. 5. "The Confederation guarantees to the cantons their territory, their sovereignty, within the limits fixed by Art. 3,[1] their consultations, the liberty and rights of the people, and the rights and powers which the people have conferred upon those in authority.

Art. 6. "The cantons are bound to ask of the Confederation the guarantee of their constitutions.

"This guarantee is accorded, provided: —

(*a*) "That the constitutions contain nothing contrary to the provisions of the Federal constitution.

(*b*) "That they assure the exercise of political rights according to republican forms, representative or democratic.

(*c*) "That they have been ratified by the people and *may be amended whenever the absolute majority of all the citizens demand it.*"

The simplest way of regulating the exercise of the popular initiative in constitutional matters, which the Federal Constitution thus provides for, was to ordain that a de-

[1] Art. 3. "The cantons are sovereign, so far as their sovereignty is not limited by the Federal constitution, and, as such, they exercise all the rights which are not delegated to the Federal government."

mand emanating from a certain number of citizens, should be followed by a popular vote. This was the system universally introduced. This demand must be made either by the primary district or communal assemblies, as in Schwyz under the constitution of 1833, or — and this was more often the case — by petitions, the number of signatures required varying according to local circumstances.[1]

At first no attention was paid to facilitating slight changes, and only a few of the texts drawn up between 1830 and 1860 provide expressly for partial revision. After experience had shown the necessity of some such a provision, it was generally enacted that, in the case of the alteration or addition of certain special articles, the initiative in bringing forward these amendments should belong to the councils or, as in the case of total revision, to the electors directly consulted, in consequence of a popular demand. This is the extension of the system already described, with this simplification, that when the project of amendment proceeds from the legislature it may be laid before the people directly, without necessitating a previous consultation of them upon the question whether the constitution ought or ought not to be revised.

With the exception of only two cantons, Solothurn, whose present constitution dates from 1887, and Bern, whose fundamental law, framed in 1846, is about to be replaced by another, all the States of Switzerland have inserted in their constitutions articles providing for and facilitating partial revisions.[2]

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[1] Exclusive of those cantons where the Landesgemeinde prevails, the number varies from 1000 (Basel-stadt) to 10,000 (St. Gall).

[2] The Bern constitution of 1893 provides for total or partial revision on petition of 15,000 citizens. Partial amendments are to be prepared by the ordinary processes of legislation and submitted to popular vote. — J. M. V.

In regard to constituent initiative, the system which we have just examined, and which consists in bestowing it in cases of total revision upon the people alone, and in cases of partial revision both upon the people and the legislature, is in operation in fifteen cantons: Lucerne, Schwyz, the two Unterwalden, Zug, Freiburg, Basel-stadt, Basel-land, St. Gall, Graubünden, Aargau, Thurgau, Vaud, Valais, and Neufchâtel.[1] This group of cantons, forming a majority in the Confederation, may be called the popular initiative group.

The Initiative of One or More Persons. — The states which may not be classed with the majority are the little Landesgemeinde cantons (Obwalden and Nidwalden excepted),

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[1] The constitution of Aargau (1885), Basel-stadt (1889), and Lucerne (1890), provide that popular initiative in cases of partial revision shall only occur when the Grand Council does not agree with the petitioners. We do not, however, hesitate to include these States in the above group, inasmuch as if the Grand Council adopts the proposition of the petitioners, it thereby makes it its own. It "makes itself responsible for it," as Art. 103 of the Aargau constitution says, and it is by virtue of its own initiative that it draws up a plan of amendment. An examination of Arts. 110, 112, and 113 of the constitution of Schwyz seems to us to lead necessarily to the same result.

We likewise include the constitution of Zug (1873) in this group, although Art. 35 seems to reserve the initiative in partial revision exclusively to the *Kantonsrath.* The following article grants it in reality, though indirectly, to the people as well, in that it provides that 1000 voters may demand a resolution from the Cantonal Council upon all matters that are within the competence of the legislature. If the Cantonal Council does not comply, it must consult the people in regard to the demand made by these thousand voters. Supposing this demand should aim at the exercise of the legislature's right provided for by Art. 35, it is evident that there might in this way be a popular initiative in cases of partial revision.

Bern and Solothurn which, as we have said, have as yet made no provision for partial revision, give the initiative in total revision to the people, consulted upon a proposition of the Grand Council or of a certain number of citizens (in Bern 8000, in Solothurn 3000).

and those which, without having the traditions or political customs peculiar to those cantons, have nevertheless adopted, in this respect as in others, the peculiar principles of their public law. In these states the privilege of constituent initiative is recognized as belonging not only to the people in their collective capacity and the people's representatives, but also to individual citizens. For this reason we think we may class them, in contradistinction to the former, in a second group: that of the *initiative of one or more persons* (*initiative individuelle et plurale*).

In the Landesgemeinde cantons, all powers are exercised by the assembly of citizens, meeting at fixed times in veritable *Champs de Mai.* Any member of the Landesgemeinde has the right to present any bill. This is the first and the most essential of his prerogatives. It is restricted simply by the necessity of presenting the proposition in time to get it upon the order of the day (*Memorial*), which must be published in advance. Sometimes a small number of signatures is required.

When, following the example of their sister states, the purely democratic cantons adopted written constitutions, the right to propose amendments to them remained in most cases included in the general right of appeal to the sovereign assembly. It is thus exercised to-day by the citizens of the two Appenzellen, Glarus, and Uri. If the discussion is about total revision, the assembly first pronounces upon the general question whether such revision should take place or not, then the elaboration of the new constitution is turned over to a constitutional convention or to an ordinary council, *Landrath* or *Kantonsrath*, whose powers are those of a permanent committee of the Landesgemeinde. In cases of partial revision, the project may be formulated in its entirety, and presented directly to the votes of the people by a

single individual, as in Glarus and Appenzell Interior, or by a group of citizens, as in Uri and Appenzell Exterior.[1]

The two half-cantons of Obwalden and Nidwalden, which also belong to the Landesgemeinde group of states, have been more strict than the others in the application of modern constitutional principles. Holding that if they

[1] Constitution of Glarus, 1887, Art. 88: "Whenever the modification of only special provisions of the constitution is proposed (partial revision), it may be made, without further requirements, in the forms provided for legislation."

Constitution of Appenzell Interior, 1872, Art. 48: "All modification of the constitution shall proceed from the Landesgemeinde. Any qualified citizen may submit to the Landesgemeinde, in the forms provided in Art. 7, a proposition of partial or total revision of the constitution. Enactments shall be made by a majority vote."

Art. 7, § 2. "Every proposition, having in view the modification of the constitution or the enactment of a law, which citizens may desire to lay before the Landesgemeinde, must be previously presented to the Grand Council. Whenever the proposition is not received by the Grand Council and presented by it to the Landesgemeinde, and provided it is not contrary to the provisions of the present constitution or of the Federal constitution, any voter may present it in person to the Landesgemeinde, either for himself alone or in the name of several citizens, and may demand that a vote be taken upon it."

Constitution of Uri, 1888, Art. 26: "One or more qualified citizens may submit proposals to the Landesgemeinde. Propositions to revise the constitution must be supported by fifty signatures."

Constitution of Appenzell Exterior, 1876, Art. 45, § 2: "Proposals to amend the constitution shall be made according to the forms prescribed by Art. 27."

Art. 27, §§ 8 and 9. "The right to submit proposals to the Landesgemeinde belongs to the Kantonsrath or to any group of citizens at least equal in number to that of its members. Proposals emanating from the people must be transmitted to the Kantonsrath before a stated time, and in writing.

"The Kantonsrath shall present to the Landesgemeinde the proposition emanating from itself as well as from the people, accompanied by a statement of its own opinion. If the petitioners have made a statement of their reasons, it shall be affixed to their proposition."

undertook the difficult task of framing a fundamental law, it ought not to be possible to abrogate it, even partially, without other formalities than those required for the modification of an ordinary law, they carefully distinguished between the act of constitution-making and the act of ordinary legislation. The latter may always be proposed in the sovereign legislature by a single citizen acting within the prescribed forms. The former, on the contrary, may only become the object of a proposal in the Landesgemeinde if this proposition emanates, in Obwalden, from five hundred citizens or from the Kantonsrath; in Nidwalden, from eight hundred citizens or the Landrath.[1] These two constitutions, dating from 1867 and 1877 respectively, provide for both partial and total revision, but in both cases the people are called upon to pronounce upon the question whether or not a revision shall be undertaken, and it is only after an affirmative answer has been given that the ordinary cantonal council or a special constitutional convention is charged with the preparation of a project. For this reason the two Unterwalden, though purely democratic cantons, must be classed among those states which have preserved the principle of popular initiative in all cases.

Another canton, whose influence is vastly greater in the councils of the Confederation, and whose example always carries with it great weight, namely, Zürich, has followed exactly the opposite course. Itself a state where representative government prevails, as a tradition, and apparently, because of its size, as a necessity, this canton

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[1] In 1894 these figures represented for Obwalden about a seventh, for Nidwalden slightly more than a fourth of the registered voters.

See Constitution of Unterwalden (Obwalden), Art. 87, and Constitution of Unterwalden (Nidwalden), Art. 86. Cf. *Annuaire statistique de la Suisse*, quatrième année, Bern, 1894, page 351.

withdrew, about twenty years ago, from the group of the majority, and adopted, not only for purposes of ordinary legislation but also of constitutional enactments, a system modelled after that of the little states in which pure democracy exists.

In 1869, the Grand Council of Zürich ceased to exist, or at least ceased to possess legislative power, and the people declared in their new constitution that they would exercise this power themselves, with the assistance of a cantonal council (*Kantonsrath.*) This sanction of the principle of direct legislation was not followed by the introduction of the Landesgemeinde. Such an institution cannot be suddenly created. In order to realize in a great industrial and agricultural canton the advantages which the citizens of the forest cantons were seen to possess, recourse was had to the obligatory *referendum* and the right of popular initiative. It was provided that the laws, whose preparation only was given to the Kantonsrath, should all be submitted to the people for approval, and that the right to propose new ones or to move the abrogation of existing provisions should belong to the voters as well as to their representatives. Article 29 of the constitution of 1869 runs as follows: —

Art. 29. "The right of voters to make proposals (the initiative) is the right to demand the adoption, abrogation, or modification of a law or a decree which does not rest exclusively within the competence of the Cantonal Council. Such propositions may be made either in the form of a general motion or in the form of a perfected bill, and in both cases the reasons must be given.

"When an individual or a political body presents a proposition of this sort, and it is supported by a third of the members of the council, it shall be submitted to the

people for final action. The author of the proposition, or if it emanates from a political body, the delegate of this body, has the right to appear before the council to declare his reasons in person, provided twenty-five members support his demand for a hearing.

"Likewise every proposition signed by five thousand voters or adopted in a certain number of communal assemblies by five thousand voters, must be laid before the people whenever the cantonal council does not itself agree to it. Every motion presented at the proper time must be submitted to the decision of the people, at the very latest, at the second of the ordinary elections following its presentation.[1]

"Before the election, the motion or bill must be sent to the Cantonal Council for its final opinion.

"Whenever a project of law emanating from popular initiative is submitted to the vote of the people, the cantonal council may present to the latter, beside its opinion upon the project in question, a plan modified in conformity with its own views."

When the question of the procedure to be followed in cases of constitutional revision was raised in the assembly which had thus prepared the complete transformation of the institutions of Zürich, it was decided that "revision of the constitution, as a whole or in parts, might be undertaken at any time by the ordinary processes of legislation." Later on, it was provided that in the case of a total revision, decreed by popular initiative, a new cantonal council should be chosen to take the matter in hand, and that propositions in regard to it should be discussed

[1] Art. 30. "Twice a year, in spring and fall, the people shall be called upon to vote upon the legislative acts of the Cantonal Council (*referendum*). In case of urgency the council may order an extraordinary election."

twice, an interval of two months elapsing between the debates.[1] Partial revision, which no special provision covered, might be undertaken and carried through as an act of ordinary legislation. This assimilation satisfied on the one hand the principles of pure democracy, as practised in Glarus, the canton which Zürich sought to imitate, and on the other it harmonized remarkably well with the doctrines of Prussian political science, already victorious in Germany, and naturally exerting a strong influence upon the jurists of Zürich. Under the regime established by the constitution of 1869, therefore, any citizen may send to the Kantonsrath a complete and definitive plan for a constitutional amendment. If this plan receives the support of a third of the members present when it is received,[2] it is submitted as it is to the people for ratification. This is also done if, lacking support in the council, the plan has received the approval of five thousand voters.

Thus there was introduced for the first time in Swiss public law, upon a vaster scale than that of the old Landesgemeinde, the system of initiative by one or more persons, which must be carefully distinguished from the popular initiative.[3]

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[1] Constitution of Zürich (1869), Art. 65.

[2] Such is the interpretation which has been given Art. 29. See (Stüssi) *Referendum und Initiative im Kanton Zürich*, Horgen, 1886, p. 93.

[3] The Grand Constituent Council of the canton of Vaud, engaged in revising the constitution of 1831, had, it is true, as early as 1845, laid down the principle that the general communal assemblies should have the right to pronounce upon every proposition that should be submitted to them "by the Grand Council acting of its own accord or upon the demand of 8000 active citizens." We see also that the provision was preserved at the time of the new revision of 1861, the number 8000 even being reduced to 6000 (Constitution of 1845, Art. 21, *litt. b*, and Constitution of 1861, Art. 28, *litt. b*). But this article, which

Whenever the entire electoral body is brought into action, the petition which ends in a consultation of the people may only be in the form of a general motion to change the constitution. This springs from the fact that the decision to revise the constitution proceeds from the people, speaking through a majority of active citizens. In the text which we have just cited, this system is admitted, but side by side is formulated the system of proposing by completed bill. The distinction between the "simple motion" (*einfache Anregung*) and the "completed bill" (*ausgearbeiteter Entwurf*) may have seemed a mere question of procedure to those who were called upon to solve the complicated and absolutely new problem of the establishment of direct government in a state which hitherto had been representative. But it was, nevertheless, fundamental in the highest degree; for, by admitting the completed bill, the exercise of the right which we wish to regulate is thereby transferred from one subject to another. The "motion" bestows it upon the people, whose verdict alone must decide whether initiative shall be exercised or not. The "bill" bestows it upon the person or persons who draw up and support the proposition.

The initiative of one or several individuals is inseparable from the completed bill; for should we desire to have it exercised under the form of a motion, we rob it of its distinctive character. It becomes popular, since it is then the electoral body which decides whether the motion shall or shall not form the starting-point for a project of revision.

The adhesion of the large canton of Zürich to the prin-

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was, moreover, limited by the amendment articles of the constitution to the domain of ordinary legislation, had remained a pure theory. It had never yet been applied, and had nowhere been copied.

ciples of pure democracy has had a very considerable effect throughout the Confederation. Following her, almost all the representative States have adopted the *referendum*, either obligatory or optional. A good number have also added the plural initiative; *i.e.* the initiative of one or more persons; but it is important to note, that most of the latter have done so only in matters of ordinary legislation. There are only two clearly marked exceptions to this rule; namely, Schaffhausen and Ticino. The constitution of Schaffhausen (1875), which gives one thousand active citizens the right to frame a bill, borrows from the public law of Zürich, in the matter of partial revision, that confusion between the constituent and legislative domains. The recent constitution of Ticino (1892) establishes, in a special article upon the *riforma parziale*, the system of popular initiative by bill.[1] In Geneva, a "constitutional law" of July 5, 1891, establishes a similar system for laws and legislative decrees. Nothing in its text states that it is applicable to the "amendment projects," provided for by Art. 152 of the constitution adopted by the people of Geneva, May 24, 1847, and still in force.

That view might be inferred from certain assertions made by its authors during the debates upon it, but the assimilation of constitutional amendments with ordinary laws is absolutely contrary to the spirit of the constitution, which was drawn up by James Fazy under the influence of American ideas, and the question seems to us too important to be thus easily solved. It is better to wait for a positive interpretation of the text of 1891. Upon this interpretation will depend the place which it will be necessary to assign to the canton of Geneva among the vari-

[1] If the *initiants* make their demand in the form of a general proposition, the bill must be drawn up by the Grand Council itself, according to the views of those exercising the initiative.

ous groups of Switzerland. With regard to total revision, to which the above-mentioned text could in no case apply, there can be no doubt. In this case the initiative belongs to the people in its collective capacity. Article 153 of the constitution provides, in fact, that the General Council of the people shall be consulted periodically upon this point.[1]

Popular Sanction.

Supposing revision to be decided upon. Except in the case of a project already drawn up and completed, which, as we have seen, is still the rare exception in cantonal public law, the committee charged with the preparation of a project to be submitted to the sovereign is either the present legislature or a legislature chosen for this special purpose. In Zug, the work of constitutional revision is confided to the existing legislature. In the canton of Basel-land, a constitutional convention is always called. In most of the cantons the two systems are combined. Just as in the States of the American Union the preparation of partial revision is, as a rule, confided to the legislature, that of total revision, especially demanded by popular initiative, is bestowed upon a constitutional convention or upon the ordinary representative legislature freshly chosen. Often the question is left to the determination of the voters, who, when they pronounce

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[1] Art. 153. "Every fifteen years the question of total revision shall be put in the General Council." [General Assembly of all voters.]

This provision was borrowed from the constitution of New York. It is also to be found in the constitution of Basel-land (1863). But the period is there reduced from fifteen to twelve years (Art. 87).

We have already pointed out the weak features of this mode of procedure, which is to-day abandoned in the new constitutions of the United States, as well as in Switzerland. Cf. above, p. 182.

upon the desirability of revision, must declare at the same time to what authority they wish to give the care of its preparation.

In the canton of Schaffhausen the constitutional convention may be dissolved by the people, a popular vote being necessitated by the demand of a thousand citizens. This provision was introduced in 1852 for the dissolution (*Abberufung*) of the Grand Council in imitation of an article which had just been incorporated into the Aargau constitution. It was extended in 1876 to apply to the case of constitutional conventions which the people might wish to dismiss.

The proposed amendment or the new constitution, once elaborated, is submitted to the ratification of the people in much the same way as in the United States, by the authority which has prepared it. Then occurs what may be called *popular sanction* of the revision (*plébiscite sanctionnel*) to distinguish it from popular initiative (*plébiscite initiatif*). Total revisions are submitted to the people *en bloc;* amendments are generally voted upon separately. The constitution of St. Gall is exceptionally strict upon this last point. "Special amendments," it says, "must be put to vote separately and article by article or section by section."[1] In certain cantons participation in the election is obligatory.[2]

The acceptance of the project is the constituent act *par excellence.* It is the sanction which gives life to the fundamental law to whose formation the exercise of the initiative gave rise. Swiss constitutions, therefore, must bear

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[1] Constitution of St. Gall, 1890, Art. 123.

[2] Constitution of Schaffhausen, Art. 108, § 6: "Participation in the vote, both upon the question of the need of a total revision and that of the acceptance of the constitution proposed, is obligatory." Cf. Constitution of Zürich, Art. 30, § 4; Constitution of Glarus, Art. 31, § 2, etc.

the date of the day of their adoption by the people, and not that of the last debate in the assemblies which draw them up. This has been done in the greater number of the cantons.[1] The others cling by habitude,—chanceries are so prone to conservatism,—to the process which was justifiable before 1830. This anomaly, which we might likewise have noticed in the United States, will no doubt gradually disappear.

In case the people refuse their sanction, the existing constitution, needless to say, remains in force unaltered. However, when the work of revision has been undertaken in consequence of popular initiative declaring the will of the nation to be in favour of a change in the constitution, the latter is manifestly weakened, especially if the people voted in favour of a total revision. In the latter case, the work must necessarily be resumed until it ends finally in the adoption of a constitution or until the decree of the popular initiative be formally revoked. This emergency has been expressly provided for in a certain number of cantons. In the Unterwalden when the people reject a project, they must decide at the same time whether revision shall be abandoned or pursued further, and by what authority. It is much the same in Aargau.[2] In Freiburg, Solothurn, and Schaffhausen the assembly which has framed a new constitution and whose work has failed of adoption must at once resume its activity and elaborate a second project. If this one is rejected, the constitution of Freiburg provides for the election of a new constitu-

[1] Zürich, Lucerne, Uri, Schwyz, Unterwalden, Glarus, Solothurn, Appenzell, St. Gall, Graubünden, Thurgau, Vaud, Neufchâtel, and Geneva.

[2] Constitution of Obwalden, Art. 90, Nidwalden, Art. 88, and Aargau, Arts. 100 and 107. Article 107 of the Aargau constitution provides that, in cases of partial amendments, a rejection "exhausts" the decree of revision, until a new exercise of the right of initiative.

tional convention, as also does that of Solothurn, but only after the people have been consulted anew and have declared in favour of it. Finally, in Schaffhausen it is required that the assembly that has failed to satisfy the people must continue to sit until it succeeds in doing so, unless the decree of revision be revoked by a popular vote demanded by itself or by a thousand citizens.[1]

All these combinations of the different applications that may be made from the consequences of a single principle, have not been adopted arbitrarily, as one might suppose from a mere dry enumeration of them. They are most often the result of local experiences which are well worth investigating, but to undertake an historical examination of them, which would alone justify us in passing judgment upon them, would unduly lengthen our study. It is both more important and less difficult to furnish here data for an estimate of their common resultant; namely, the system of revision adopted by the Federal Constitution. We discover between the institutions of the Confederation and those of the cantons, a double current of reciprocal influences. Down to 1874 the latter exerted a greater influence upon the former than the former exerted upon the latter. Since the adoption of the present constitution, the proportion has been reversed. The impulse seems now to come from the centre.

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[1] Constitutions of Freiburg, Art. 81, Solothurn, Art. 79, and Schaffhausen, Art. 108. Cf. Emile Genequand, *La revision constitutionnelle* (Doctor's dissertation), Geneva, 1891, Ch. VIII.

CHAPTER IV.

POPULAR REVISION IN THE FEDERAL CONSTITUTION.

1. The Constitution of 1848.

THE Federal compact concluded in 1815 under the auspices of the Holy Alliance, was a compromise between the institutions of the old regime and those rights proclaimed by the Revolution which the reactionaries had been compelled to respect; a compromise, needless to say, greatly in favour of the former. It formed Switzerland into a confederation of cantons that were as completely independent of each other as was compatible with the existence of any bond of union. When the strongest of these cantons had overthrown the charters of the Restoration, they desired to modify the compact in order to introduce into it the principle of popular sovereignty and to establish a union more capable of assuring Swiss democracy her place in Europe. The Diet decided to satisfy this desire (1832), but to preach renouncement to independent sovereign states is a difficult task. Properly speaking, a compact is never revised; it is abrogated and a new one is made. Differences of opinion were manifested, even among the progressive, liberal cantons. A project, whose principal author was the jurist Rossi, then representative from Geneva, was framed with the greatest difficulty, but fell through, July 7, 1833, because of an unfavourable decision of the people of Lucerne, whose vote was necessary to win for it the support of the majority of the cantons.

To solve the question nothing less than a civil war and a triumph of Federal arms were necessary.

The constitution adopted in 1848, soon after the war of the Sonderbund, recognizes a twofold sovereignty, that of the Swiss nation and that of the people of the twenty-two cantons. In form they are equally balanced, in fact the former is preponderant throughout the Confederation. This is clearly seen in the organization of the powers of both jurisdictions.

The supreme authority of the Confederation is exercised by the "Federal Assembly," composed of two sections, — the "National Council" and the "Council of States"; the latter, representing the sovereign cantons, consists of forty-four deputies from twenty-two cantons; the former, representing the sovereign nation, is composed of the representatives of the Swiss people, chosen at the rate of one for 20,000 inhabitants, and is consequently almost three times as large as the chamber of state representatives. Being separated, these councils act as two chambers of equal importance whose agreement is essential for the efficient exercise of legislative functions. When united, with the president of the National Council presiding, they choose both the "Federal Council," which exercises the executive power, and the "Federal Tribunal." They enjoy the right of pardon and decide questions of conflicting jurisdiction, always by a majority vote.

The exercise of the constituent power is regulated as follows: —

Art. 111. "The Federal Constitution may at any time be amended.

Art. 112. "Amendment is secured through the forms required for passing Federal laws.

Art. 113. "When either council of the Federal Assembly passes a resolution for amendment of the Federal Constitution and the other council does not agree; or when 50,000 Swiss voters demand amendment, the question whether the Federal Constitution ought to be amended is, in either case, submitted to a vote of the Swiss people, voting yes or no.

"If in either case the majority of the Swiss citizens who vote pronounce in the affirmative, there shall be a new election of both councils for the purpose of preparing amendments.

Art. 114 and last. "The amended Federal Constitution shall be in force when it has been adopted by the majority of Swiss citizens who take part in the vote thereon and by a majority of the States."[1]

This text, which was incorporated almost without modification in the constitution of 1874, invests the initiative in revision either in the people or in the council.[2] The sanction of it belongs conjointly to the people and the cantons. This results necessarily from the recognition of a twofold sovereignty.

It is needless to say that with reference to the provisions of Arts. 113 and 114, Art. 112 determines merely a question of form. It only signifies that the customary

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[1] *Recueil des constitutions fédérale et cantonales* (1st ed.), Bern, 1860.

[2] We propose to speak, of course, only of the initiative in connection with the constituent authority, which alone is initiative in matter of revision. The initiative which has to do with the national parliament is of a purely legislative character. It is merely the right to propose to the Federal Assembly that it use, itself, its own initiative in constitutional matters. By virtue of Arts. 81 and 112 of the constitution (text of 1848, preserved in 1874), this right belongs to each of the two councils "and to each one of their members." The cantons may exercise it by correspondence.

rules of legislative procedure shall be adhered to in cases of constitutional revision. It would be impossible to argue from it that the Federal Constitution authorizes an assimilation of the exercise of constituent functions with ordinary legislative acts. The introduction of the referendum for all laws and for enactments of general application, not requiring urgency, has made no change in this matter. For this referendum differs essentially from the popular vote upon constitutional measures (*plébiscite constituant*). This is apparent both from its origin and from the manner in which it operates. Itself one of the old institutions of Germanic democracy, which until recently knew nothing of the regime of written constitutions, the referendum has not become, under the optional character given it by the public law of the Confederation, a necessary factor in organic legislation. A statute is made by the councils agreeing. A demand for a referendum made within a certain interval will suspend the operation of this law until the people have pronounced upon it. The voters may, by approving or disapproving the work of their representatives, sanction or repudiate it. By so doing, the people acts in its capacity of supreme legislator of the land, but it does not result from this that the legislative sanction emanates directly and necessarily from the people on the same footing as the imperative act which gives the constitution its existence.

Unfortunately, the confusion which may arise between these two kinds of popular participation is often encouraged, even in Bern. The word "plebiscite" has borne the odium attached to it in France under the Empire. It has an evil sound for the republicans who witnessed the *coup d'état* of 1851. In Switzerland there has been a very natural tendency to replace it in current speech by the name of the institution which had sprung up on the

home soil. This habit has even found its way into official documents. These, like the newspapers, often apply the word "referendum" to the exercise of the constituent powers. It has even happened that the Federal Council has submitted to the people, by a single decree, an amendment to the constitution and a Federal law upon which the referendum had been demanded. The precedent is to be regretted as possibly leading men into error by making them think that by their double vote they were exercising one and the same right. But this is purely a precedent in administration, not necessarily involving any interpretation of the constitution, and might be criticised only for its practical effects on the political education of the masses. Otherwise the constitution is sufficiently clear to prevent the jurists from erring in regard to the distinctions it makes.

We have seen that popular initiative was not a creation of French public law, but was already in operation in several cantons. The number of signatures required for the petition, 50,000, corresponded at the time it was adopted to about an eighth of the qualified voters. The innovation of the constitution-makers of 1848 was their application of the popular initiative to cases where there was a difference of opinion between the two branches of the Federal Assembly. If this happens in the case of ordinary legislation, the project in question fails. This is a necessary result of the adoption of the bi-cameral system. There was a desire to avoid this in constitutional matters, hence the decree of the house which declares in favour of revision does not fall completely to the ground if not approved by the other, but assumes another form, having the same effect as a demand of 50,000 citizens.

If the people vote in favour of revision, the houses are *ipso facto* dissolved and new ones chosen to effect it, which

is not the case when revision is undertaken upon the initiative of Parliament. The reason for the dissolution of the Federal Assembly becomes therefore apparent when we consider that whenever a recourse to popular initiative has taken place either in opposition to the opinion of one of the councils or irrespective of both, it was because it was believed difficult to obtain a majority for revision in either.

The reader has noticed, no doubt, that the text, cited above, speaks of "revision" in general, without distinguishing between a total and a partial alteration of the constitution. This neglect was destined to give rise subsequently to much discussion, finally occasioning the amendment of 1891, which we shall have occasion to examine farther on. It is well to note here that it was intentional. In the course of the debates of the Constitutional Diet, the delegation from Basel-stadt proposed that Art. 112 be so amended as to read that the Federal Constitution might be revised at any time "in its entirety or in part." This form was rejected as useless, after a declaration had been made and inscribed in the minutes that it was the opinion of the majority that a partial revision might be undertaken under the same conditions as a total one.[1]

We have already stated why the constitution was declared subject to revision at any time. The reasons are the same as those that had caused the insertion of similar provisions in the constitutions of the cantons.

The constitution of 1848 was presented, not to the Swiss people, which in law could exist only after its adoption, but to the cantons. In almost all of them it was submitted to the people, and the result of these popular votes determined the attitude of each canton. The constitution

[1] *Abschied der ordentlichen Eidgenössischen Tagsatzung vom Jahre 1847*, IV. 158.

was ratified by fifteen and one-half cantons, and thus became the law of the land.

The articles under consideration were interpreted for the first time in 1865, when the Federal Assembly took the initiative in effecting a partial revision of the constitution. January 14, 1866, nine amendments were submitted to the people and the cantons. The vote was taken upon each one separately and eight of them were rejected. Only one received the requisite double majority of people and states. This repealed a most illiberal clause of the constitution of 1848, by which the Jews were put into a position of shocking inequality as compared with their Christian fellow-countrymen, and even made them worse off than their French co-religionists, who had by treaty the liberty of settlement throughout the Confederation.

2. *The Popular Vote of 1872.*

The eight amendments which were rejected in 1866 would have bestowed new powers upon the central authority. Despite the check which revision then received, it is, nevertheless, true that public opinion was not opposed to the views of the Federal Assembly as far as the principle involved was concerned. The people simply wished to postpone it until a total revision should seem opportune. That moment came sooner than was expected. The general elections of 1869 turned partly upon reform programmes, and a majority in favour of revision was chosen to the National Council. At the very opening of the session the government was asked by the assembly to formulate such propositions as would bring the constitution "into harmony with the needs of the times." The project drawn up in conformity with the resolution consisted of thirteen amendments, all of which were to be

laid before the country, separately. Again the alteration of the constitution was presented under the form of a partial revision.

The parliamentary committees charged with the examination of this project had hardly been appointed when war broke out between France and Germany. The Federal Assembly summoned the different contingents of cantonal militia, appointed a commander-in-chief, invested the Federal Council with full powers to send the army to the frontier, and deferred further action till later.

The committee of the National Council did not resume its sessions until February 27, 1871. It was then under the spell of the events that had just transpired in Europe. The great lesson of experience had given the idea of centralization an importance and a weight which impressed even those least disposed to receive it. The concentration of all the forces of the nation became an absolute, unavoidable necessity. Without formally declaring their wish to undertake a total revision, the committee decided to examine each article of the constitution with searching scrutiny, to see if it might require modification. Their colleagues of the Council of States did the same, and in this way a plan for a new constitution was framed.[1] Commencing its deliberations on November 6, the Federal Assembly finished its work March 5, 1872. The revised constitution received 78 votes against 36 in the National Council, and 23 against 18 in the Council of States.

The constitution did not modify the exterior structure of the system of 1848, but increased considerably the powers of existing Federal authorities. Unification of the

[1] An appeal had already appeared in the official bulletin in August and September, 1870, inviting all Swiss citizens, communes or corporations, to transmit to the Federal chancery their desires with reference to the constitution. (For the result, see the *Feuille fédérale* of October 22, 1870.)

army and of the laws; centralization in the administration of the railways, and in the superintendence of the rivers and forests in the upper mountain regions; Federal intervention in the domain of public instruction; Federal guaranty of liberty of conscience and liberty of worship; civil equality throughout the different cantons in both communal and cantonal affairs, for natives as well as for citizens migrating from other cantons; reorganization of the Federal Tribunal and an extension of its powers; and lastly the establishment of the referendum and the initiative; such were the principal innovations contemplated by the project. It contained also provisions giving the Confederation the right to enact measures concerning lotteries; to make laws for the issue and redemption of bank-notes; to legislate upon emigration agencies and organizations for insurance now placed under Federal supervision; to enact uniform provisions for the protection of workmen against the evils of unhealthy manufactures, etc.

The sudden concentration of so many powers within the hands of the Confederation raised the charge against the Assembly of having introduced a completely consolidated, unified government, and men pointed to the bloody days of 1798. Upon submission *en bloc* to the people and the cantons, on the 12th of May, 1872, the project, which had received more than a two-thirds majority in the National Council, was rejected by a popular vote of 260,859 to 255,606, and by 13 States against 9. The country desired reforms and a certain amount of centralization, but did not wish so much as its representatives offered. The opposition was so violent to this measure in many districts that it has been said, with a good deal of justice, that the popular vote of the 12th of May was for Switzerland practically a revolution.

3. *The Constitution of 1874.*

The project of 1872 failed, but the desire for revision survived. The renewal of the National Council, which took place that very year, returned the majority of 1869. At the request of the Federal Assembly, the government resumed work upon the constitution, and on the 4th of June, 1873, laid before the chambers a second plan of revision. The labours of the parliamentary committees were rapidly brought to a close. The deliberations of the councils themselves took place in November and December, 1873, and during the first weeks of the following year. On the 31st of January, 1874, the new constitution was adopted in the National Council by 103 votes to 20, and in the Council of States by 25 votes to 14.

Unity of legislation was now required only in regard to matters of civil rights and the legal questions relating to commerce and to transactions affecting chattels. The cantons preserved some slight remnants of their military prerogatives. The intervention of the Confederation in the domain of public education was reduced to a few provisions, guaranteeing freedom of conscience and placing primary, free, and obligatory education under the exclusive direction of the civil authority. In other respects, the provisions of the plan of 1872 were reproduced with some modifications aiming to facilitate the transition from the old to the new regime. The referendum was preserved; but the initiative, which, combined with the popular vote in legislative matters, possessed, in the eyes of the federalists, the grave fault of permitting legislation without the participation of the states, was abandoned. To compensate for this, the number of signatures necessary to occasion an appeal to the people was reduced from 50,000 to 30,000.

The chapter on constitutional revision remained as framed in 1848. Two additions were made relative to the vote of the cantons, experience having proved them necessary: —

Art. 121. "The amended Federal Constitution shall be in force when it has been adopted by the majority of Swiss citizens who take part in the vote thereon, and by a majority of the *States*.

"*In making up a majority of the States the vote of a half-canton is counted as half a vote.*

"*The result of the popular vote in each canton is considered to be the vote of the State.*"[1]

The Federal Council was charged by the chambers to present the new constitution to the people and the cantons, accompanied by a proclamation. The manifesto appeared March 23. After having described the reforms which the proposed constitution was to effect in the Federal public law, it closed as follows: —

"Fellow-citizens, we do not attempt to deny that along with unquestionable advantages there may also be defects in the project which we now present to you; we do not pretend to have already attained the goal toward which we are tending. We well know that this work bears the stamp common to all human productions.

"Some will find that the sphere of federal power has been too circumscribed; others, on the contrary, that the limits proper to a federal state have already been passed. But upon one thing every one will agree, namely, that

[1] Constitution of 1874, Art. 121. Cf. above, p. 293, the text of 1848, Art. 114. Articles 111, 112, and 113 of the constitution of 1848 became Arts. 118, 119, and 120 of the new one.

we have remained loyal to that principle of frank conciliation and that spirit of patriotic self-sacrifice, which alone, in the face of so many differing and clashing interests, permit the happy consummation of so arduous an undertaking. You will also admit that the project contains many fruitful germs which, developing under a wise and prudent public policy, will produce good fruit, and that it imparts an impulse to forces hitherto latent, which promise to become new sources of public prosperity.

"Finally, you will concede that we have honestly striven to build up a structure in which, with the exercise of some good-will, the twenty-two small families which form the great Swiss family may live together in harmony, giving each other aid, and successfully advancing, like other nations, in the path of civilization, the common goal of humanity.

"Happy are we that once more the new production has been entirely of our own making; that, free from all exterior influences, we have had only to consult our own interests and needs.

"Happy are we if to-day we rightly catch the voice of the times, the voice that urges us to place our destinies under the protection of solid constitutional guaranties. The horizon is not clear; there are clouds upon it; the great social questions are becoming more and more numerous and imperative. Let us seize everything which may stir and strengthen the public conscience. It was under the sway of such sentiments as these that the Federal Assembly adopted, by a great majority, on January 31, the project which it has charged us to submit to your sovereign approval.

"For our own part, we share unreservedly the views of the representatives whom you have honoured with your confidence, and we do not hesitate to urge you, earnestly

and with sincere conviction, to give them your approval.

"We further affirm, in all frankness, that we should regard another rejection as a national misfortune, a misfortune to be averted only when each citizen shall make upon his country's altar the sacrifice of private opinions or interests, and willingly bow before a higher necessity. The moment has come, we all feel, to close the era of agitation that has marked these latter years, and to enter anew upon an era of continuous and peaceful progress.

"Prepare then, fellow-citizens, with courage and confidence and in a spirit of lofty patriotism, for the day that shall decide this great question and open for us a new era, full of hope and full of promise.

"It is the duty of each citizen, in a moment so serious, to listen only to the voice of his conscience, and to let himself be guided by a single thought, namely, *to work for the honour and happiness of the common fatherland, to avert everything that might injure it, faithfully and honestly, and as truly as he desires God's aid.*[1]

"Let us, then, embrace the fond hope that in the great book of the annals of our Swiss Confederation, old and yet young, history will inscribe the date April 19, 1874, as that of a glorious day, which our descendants will hold in grateful and loving remembrance.

"If the project submitted to you obtains from the people and the cantons the reception we hope for, we will cherish the same wish for it as that which greeted the adoption of the present constitution.

"May the Arbiter of the destinies of peoples make the new fundamental law of our land an abundant source of blessing for our children and our children's children."[2]

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[1] Oath of the deputies in the old Diets.

[2] *Feuille fédérale*, 1874, I. 492 seq.

This appeal to the good sense and patriotism of a free nation, in which simplicity, or rather a certain *bonhomie* of expression is joined so remarkably with elevation of thought and grandeur of theme, has few parallels in the history of Europe. Certain addresses to the people of the States of the American Union resemble it. These two federal republics are placed in widely different situations, they have followed widely different paths, and yet the experiences they have had, the political institutions which have grown up in them, the national spirit they have developed, exhibit certain features in common, present certain similarities, all the more striking as they are only now beginning to excite attention. They give new and impressive proof of the fact that modern democracy obeys the same law of evolution in every latitude; that it is, as has been truly said, not only a form of government, but also a state of society.

The constitution of 1874 was accepted by the Swiss people on the 19th of April, by a majority of 340,199 votes against 198,013, and of the cantons, fourteen and one-half voted in its favour and seven and one-half against it.

The reader will permit us still another quotation in regard to this popular vote. It is taken from the report presented to the committee of the Council of States by Herr Kappeler, representative from Thurgau, and seems to us preferable to any less authoritative utterance.

"The result, as a whole, either of the popular vote or of the vote of the cantons remains, it may be said, absolutely unquestioned, and the confidence which we may have in this manifestation of the national will is thereby increased.

"The insignificant irregularities, committed in two or

three communes, and referred to in the message of the Federal Council and in the report of the committee of the National Council, have no real importance. Many interesting statistics might be drawn from the general result, especially if the vote be compared with that of 1872. As this, however, does not come within the range of my report, I will refrain from it, contenting myself with calling attention to three features which augment the value of this result.

"(*a*) The unlimited discussion preliminary to the vote, both in the press and on the platform, in the course of which opinions obtained expression either in favour of the constitution or against it. We note that no local authority, nor any party, entertained a thought of opposing this free discussion.

"(*b*) The general participation of the people in the vote. Out of two and a half millions of inhabitants, 538,212 electors cast their votes, hence 21,571 more than in 1872. Thus to every thousand inhabitants there were 214 voters. This is a real plebiscite.[1]

"(*c*) The quiet and dignified way in which the election was conducted, which sufficiently proves the political maturity of our people. Although, previous to the vote, exaggerations of every kind were not wanting, and although great heat was betrayed in several places, yet the great act was accomplished, everywhere, we may say, with impres-

[1] At the time Herr Kappeler made his report to the Council of States, it had not yet been possible to determine exactly the total number of qualified voters in the different cantons. It is only since 1879 that an enumeration has been possible. On the 19th of January of that year that number was 636,996. (See *Statistisches Jahrbuch der Schweiz*, Bern, 1892, p. 316, Ch. XVIII. Table B.) This shows that in 1874 about five-sixths of the entire electoral body went to the polls, which gives a participation of nearly eighty-five per cent, or one of the heaviest ever known in a vote of this character.

sive solemnity. Throughout the entire country there was no trace of trouble or violence.

"And this is why this constitution has become not only formally *in law*, but in the most profound meaning of the word, *in fact*, the fundamental law of Switzerland, a law that no party will attack, not only because no party will be able to attack it, but still more because no party will wish to, so great is the respect which a legal majority inspires in this country. This is the result of a long and wise enjoyment of liberty."[1]

4. *The Amendment of 1891 concerning the Initiative.*[2]

Since 1874 the Federal Constitution has received five amendments, one in 1879, one in 1885, one in 1887, and two in 1891. The first, modifying Art. 65 so as to restore to the cantons the right to re-establish the death penalty in their special systems of state legislation, was adopted by 200,485 votes against 181,588, and by fourteen cantons. The second, aiming to permit the establishment of a federal monopoly for the manufacture and sale of alcohol,

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[1] *Feuille fédérale*, Ibid. 538. We have constantly referred to the German original in our interpretation of the text of this report. The official translation of it, made in Bern, is at times so defective that we should wrong the author's thought in placing it before the French reader as it stands.

[2] In our investigation of the right of popular initiative, as applied to the revision of the Federal Constitution, we have had recourse to the unpublished official minutes of the debates in the chambers, to the stenographic report of the debates of 1890 and 1891, published by the journal *Der Bund*, to different articles in the *Gazette de Lausanne*, and to the important correspondence from Bern of M. Paul Pictet to the *Journal de Genève*. The latter kindly placed at our disposal a collection of documents, which he had gathered for his own use, and which have been of very great service.

was sanctioned by 230,250 popular votes against 157,463, and by fifteen states. The third, which bestows upon the Confederation the protection of industrial property, was approved by 203,506 votes against 57,862, and by twenty and one-half cantons. Finally, of the two amendments of 1891, one was adopted by 231,578 votes against 158,615, and by fourteen cantons, and establishes a federal monopoly of bank-notes, while the other has introduced into federal public law a mode of partial revision, which it had not hitherto known. We must now retrace the origin of this system and determine its importance.

It will be remembered that in 1848 the Constitutional Diet, when upon the point of terminating its labours, had caused the insertion of a declaration in the minutes, as the opinion of a majority of its members, to the effect that a partial revision of the constitution might be undertaken under the same conditions as a total revision.[1] When, in 1865, an occasion offered to interpret the new Federal compact in this particular, the Councils, drawing their inspiration from the suggestions of the Diet, undertook the alteration of particular articles. Likewise, after 1874, the five amendments just mentioned were proposed to the people and cantons upon the initiative of the Assembly. In none of these cases was there a difference of opinion between the National Council and the Council of States capable of giving rise, disadvantageously, to the popular participation, provided for by Art. 120.[2] But it is clear that if this supposed case had really arisen, the Federal Council would have been obliged to consult the people upon the question of complying with the demand for revision; in other words, that the popular initiative would have been

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[1] See above, p. 296.

[2] Article 113 of the text of 1848. See above, p. 293.

exercised. It is plain that if, in determining the right of the chambers, we take into account the interpretation which the last Diet itself intended to give its work, we must do the same in what concerns the electoral body. Such is not, however, the interpretation which has prevailed in the councils of the Confederation.

In 1879 a petition, containing more than 50,000 signatures, asking that the confederation be invested with the monopoly of bank-notes, was laid before the Federal Council. To this demand was joined the text of the article whose insertion in the constitution was desired. It might have been expected that this demand would be submitted to the voters, under the form of a general motion for a partial revision in the way indicated by the signers, but without attaching any other importance to the article which they thought wise to draw up than that of an explanatory formula, serving to make clear the significance of their wish. In case the project, ratified by the majority, should have consequently become the wish of the electoral body, Parliament would have been renewed upon this platform and would have prepared the law to be submitted to the people.

But this was not the course that was followed. Upon a proposition of the Federal Council, the chambers decided that, according to the provisions of Art. 120, only the question of total revision could be laid before the people. But it was not thought wise to ignore the demand of the 50,000, so it was decreed that the people should be consulted, under this general formula: —

"Ought the present Federal Constitution to be revised?"

The people were perhaps disposed to give the Confederation a monopoly of the bank-notes. This they did in

1891, but whatever its opinion was on that subject, the majority had no intention of allowing its vote to be used as a warrant for an entire re-opening of the project of 1874. This was shown October 31, 1880, when it returned a decisive negative at the polls.[1]

The Federal Council, in its messages to the chambers, had given the following reasons for its decision: —

If the Federal Assembly may take the initiative in a partial revision, it must be by virtue of Arts. 71, 84, and 85 of the constitution, which invest it with supreme authority, reserving, however, the rights of the people and the cantons, and expressly including among its attributes "the revision of the Federal Constitution." (Art. 85, § 14.) The initiative cannot belong to the people, because then the popular vote would be, not as stipulated in Art. 120, upon the general question whether or not the constitution ought to be revised, but upon a particular stated amendment. The people, in voting for a partial revision, would at the same time be deciding upon the fundamental question. The Assembly which should have charge of the preparation of this revision would be bound in advance by the verdict of the people. It would receive an imperative mandate. Now, Art. 91 declares explicitly that "the members of the two Councils shall vote without instructions."[2]

It seems to us that this line of reasoning may be met with some strong counter-arguments. In the first place,

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[1] 260,126 nays, against 121,099 yeas.

[2] Messages of November 28, 1879, and August 18, 1880. The message of 1879, to which that of 1880 expressly refers, had been occasioned by an earlier petition concerning the monopoly of bank-notes, and which, not having the support of signatures enough to give it the importance of a demand, was refused.

if Art. 85 speaks of the competence of the Federal Assembly in constitutional matters, this occurs in the course of a general enumeration of its attributes, and this particular declaration, which closes the list, is plainly a reference to the third and last chapter of the constitution, which is devoted to the subject of revision. To the provisions of this chapter we must recur, if we would determine the nature and extent of the powers of the Assembly in questions of constitutional amendment. These powers cannot possibly depend upon its legislative functions. This would be absolutely contrary to the spirit of the public law whose bases were laid in 1848. If the Assembly has the right to adopt constitutional amendments and submit them to the country, it must be because the chapter just referred to may be, and ought to be, in the opinion of its own authors, so interpreted.

Secondly, to estimate at its true value the argument drawn from Art. 91, we must remember that this article is intended, above everything else, to define the difference between the situation of the deputies of the old Diet and that of the members of the Federal Assembly. The former, being ambassadors, received instructions from their cantons. They often voted *ad referendum;* that is, they reserved to their constituents the right of ratification. This is the regime which, after the suppression of the Sonderbund, men wished to destroy. In our time the popular referendum has succeeded the former diplomatic referendum. The representative of to-day has no imperative mandate, but he is perfectly aware that if he enacts a law manifestly contrary to the wish of his constituents, this law will be rejected. Hence he avoids, as far as possible, making such enactments. Let us take the case of a representative sent to Bern in consequence of a popular vote which has declared in favour of the revision of a

particular article of the constitution. In relation to the task before him, he is not in a less acceptable position than is the representative who legislates upon a question upon which the people have pronounced or will pronounce by the referendum. On the contrary, he has the advantage over the latter in his recent election, an election made upon a political programme, in which the desired amendment has played a most important part, and previous to which he had only to decline being a candidate if he did not sympathize with the wishes of the people.

By interpreting the amendment clauses of the constitution in a way contrary to that of its founders, the federal councils disturbed the equilibrium which the former wished to establish between the initiative of the Federal Assembly and that of the people. Denying to the people the domain of partial revision which they conceded to the Assembly, they deprived the electors of a right which public opinion was destined to demand sooner or later for them. Upon the demand of 50,000 citizens, the people might decide upon a total revision of the constitution, the legislature to the contrary. Why should they enjoy no rights of initiative in cases of special and partial reforms? The state constitutions contained no such provisions. Whoever can do the greater, can do the less. The good sense of Switzerland was not slow in protesting.

In 1884 a motion, made in the National Council, proceding from the Catholic conservative party, and whose most prominent author, M. Zemp, is to-day a member of the government, raised, among others, the question of popular initiative. It was demanded that the constitution be completed in this particular. Sent to the Federal Council for its opinion, M. Zemp's motion remained for several years an object of study. In 1888 a general petitionary movement, organized by the strong workingmen's

society, the *Grütliverein*, raised the "postulate" concerning the rights of the people into a subject of pressing and vivid interest.[1] From the different demands made in the petitions, which included both the election of the Federal Council by the people and the obligatory referendum, the National Council showed a disposition to retain that which concerned the initiative of partial revisions.[2] The government promised to make a report and frame propositions on the subject, and on the 13th of June, 1890, laid before the Federal Assembly a plan of revision of the third and last chapter of the constitution.

This project introduced into the text itself of the provisions under examination the interpretation which the Diet of 1848 had thought sufficient to indicate by a mention in its minutes. It formally enacted that "the Federal Constitution may at any time be *wholly or partially* amended." No change was made in the article of total revision, except that it was expressly stipulated that it alone

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[1] There were eight petitions addressed to the Federal Council. One was signed by the Central Committee of the "Grütli Society," five were sent by the branches of this society (Graubünden, Aargau, Thurgau, Bern, Basel), another by the Executive Committee of the Swiss *Arbeitertag*, and the last one by the "Democratic Committee of St. Gall." These documents may be found in the archives of the Federal Chancery.

[2] Such had been for years the doctrine of the Federal Council. On several occasions it had in its messages considered the possibility (which was never realized) of a disagreement of the councils upon a question of partial revision, and it had laid down the principle that in such a case there would be no reason for consulting the people. The proposition at issue would be stricken from the order of business, like a law passed by one chamber, and not ratified by the other. This system, which the Federal Council has merely enunciated, without ever justifying it by a legal argument, is contrary to the spirit which prevailed in the formation of the constitution of 1848. The jurists who revised the compact of 1815 would certainly have rejected it, from fear that it would lead to a deplorable confusion between the domain of legislation and that of constitution-making.

may give rise, in case of a disagreement of the houses, to a popular vote involving the dissolution of the Assembly. Moreover, it provided that partial, like total revision, may be decreed by the people, upon the demand of 50,000 citizens, with this difference, that the popular initiative does not then necessarily involve the renewal of the Federal Assembly.[1]

The project was adopted by the National Council, after some slight alterations in the form, on the 23d of September, 1890.[2] Leaving out of view the possibility of a dis-

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[1] See the report of the session of April 3, 1889.

[2] Text of the project adopted by the National Council: —

Federal decree concerning the revision of the Federal Constitution.

"The Federal Assembly of the Swiss Confederation, in view of the message of the Federal Council of June 13, 1890, in application of Arts. 84, 85 (Clause 14), and 118 of the Federal Constitution decrees: —

Art. 1. "The third chapter of the Federal Constitution of May 29, 1874, which treats of revision, is hereby modified as follows: —

Art. 118. "The Federal Constitution may at any time be wholly or partially amended.

Art. 119. "In both cases amendment is secured through the forms required for passing federal laws.

Art. 120. "When either council of the Federal Assembly passes a resolution for the total revision of the Federal Constitution, and the other does not agree; or when 50,000 Swiss voters demand the total revision, the question whether the Federal Constitution ought to be revised is in either case submitted to a vote of the Swiss people, voting yes or no.

"If in either case the majority of the Swiss citizens who vote pronounce in the affirmative, there shall be a new election of both councils for the purpose of preparing the revision.

Art. 121. "The people may also demand, through the popular initiative, the abrogation or modification of particular articles of the Federal Constitution, as well as the adoption of new constitutional provisions.

"If in this way several different articles are presented to be revised or admitted into the Federal Constitution by way of popular initiative, each must form the subject of a special petition.

"When fifty thousand Swiss voters make a demand of this character, the question whether the partial revision demanded ought to be made

solution of Parliament, rejected in the plan we have just examined, this was the logical development of the system of 1848. The way which had been imprudently closed by an interpretation of the documents, was re-opened by a legislative act.

If the Council of States had shared the views of the government and the National Council, the revision of the third chapter of the constitution would have incorporated into Federal usage the system of popular initiative in force, as well for partial as total revision, in the majority of the cantons. But such was not the case. A representative of Zürich, Herr Locher, a member of the Social-Democratic party, had already outlined in the National Council the system of plural initiative by completed bill, introduced, as we have seen, in his canton in 1869. This idea found advocates among the conservatives in the Council of States, and gave birth to a counter-project. The representatives of the cantons altered the decree which the representatives of the people had adopted. Their plan aimed to introduce the Zürich system into the Federal Constitution. Again it was necessary to make the question an order of the day in the National Council, and the

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shall be submitted to a vote of the people; if the majority of the Swiss citizens who take part in the vote pronounce in the affirmative, the Assembly shall proceed to the work of revision.

"A Federal law shall decide the further mode of procedure in these popular petitions and votes.

Art. 122. "The amended Federal Constitution shall take effect when it has been adopted by the majority of Swiss citizens who take part in the vote thereon and by a majority of the cantons.

"In making up a majority of the cantons the vote of a half-canton is counted as half a vote.

"The result of the popular vote in each canton is considered to be the vote of the cantons.

Art. 2. "The present Federal decree is submitted to a vote of the people and the cantons."

subject occupied a part of the sessions of the 7th and 8th of April, 1891.

For want of making a distinction, which, indeed, only the eye of the experienced jurist is apt to detect at first, but which must nevertheless be made, between the initiative of the people themselves through a popular vote, and the *demand for the initiative* made by 50,000 irresponsible citizens, men had criticised the Federal Council's project, accusing it of uselessly necessitating two consultations of the people upon the same question. Following a provision of the counter-project, and to satisfy as much as possible those who desired above everything else to simplify the procedure, the committee of the National Council proposed to so alter the government's first plan as to avoid the consultation of the people upon the question whether the revision demanded ought to be made, whenever the chambers agree with the 50,000 petitioners. In such a case, indeed, the Federal Assembly may adopt the motion, and the exercise of the parliamentary initiative may dispense with the exercise of the popular initiative.

The Federal Council, speaking through Herr Schenk, consented to this proposition. Moreover, it maintained with vigour the system it had formulated in earnest only after a profound study of the subject. The majority of the National Council was, however, divided, for on the one hand, the conservative centre declared itself in favour of the ideas of the Council of States, and on the other, the partisans of advanced democracy found difficulty in rejecting an innovation which offered itself under the guise of a popular conquest. A mass of individual propositions came to the surface, and amendments to every plan. The last days of the session had begun. Work was still accumulating in the committees, and the Council soon tired of these discussions of complicated propositions and ab-

stract political theories. After debates, which considering their importance, were too short, and so confused that the newspapers gave up reporting them, a vote was hastily brought on, and, in spite of the efforts of the government and the committee, the formula of the Council of States was adopted, by 71 votes to 63, answering to the roll call.

The decree was final. Submitted to the vote of the people and the cantons July 5, 1891, it obtained 183,029 votes against 120,599, the majority being scattered over eighteen states.

Attention has been called to the fact that participation in the vote was very light. It was one of the lightest ever known. The amendment of 1891, approved by only 183,029 citizens, was, of all those which have been adopted since 1848, the one which received the fewest votes. Certain it is that the Swiss people very much desired to see its right of initiative formally recognized by the constitution, as well in the case of partial as in that of total revision; but the election returns justify the statement that it was not pleased at the way in which the exercise of this right was regulated.[1]

[1] As the National Council was about to be called upon to pronounce upon the project of the Council of States, one of the most influential jurists of the Federal Assembly, Herr Hilty, professor in the University of Bern, circulated among his colleagues a plan of his own (April 4, 1891), which in every respect deserves mention. Far less complicated and much clearer, in its German dress, than the provisions adopted, he refers to its proper place the entirely artificial and in no way legal distinction which men have been compelled to make between partial and total revisions. On the other hand, though granting the system of initiative by completed bills, he frees it in practice from some of its faults, by giving each chamber the power to provoke a preliminary popular vote upon the question whether revision ought to be undertaken or not. This project may be found in the excellent publication which its author devotes every year to a summary of the political development of Switzerland. *Politisches Jahrbuch der schweizerischen Eidgenossenschaft*, Bern, 1892, p. 200 seq.

As a result of the debates and votes which we have just described, the last chapter of the Federal Constitution has assumed the following form: —

Chapter III. Amendment of the Federal Constitution.

Art. 118. "The Federal Constitution may at any time be wholly or partially amended.

Art. 119. "Total revision is secured through the forms required for passing federal laws.

Art. 120. "When either council of the Federal Assembly passes a resolution for the total revision of the constitution and the other council does not agree, or when 50,000 Swiss voters demand total revision, the question whether the Federal Constitution ought to be amended is, in either case, submitted to a vote of the Swiss people, voting yes or no.

"If, in either case, the majority of the Swiss citizens who vote pronounce in the affirmative, there shall be a new election of both councils for the purpose of preparing the total revision.

Art. 121. "Partial revision may take place through the forms of popular initiative, or of those required for passing Federal laws.

"The popular initiative may be used when fifty thousand Swiss voters present a petition for the enactment, the abolition, or the alteration of certain articles of the Federal Constitution.

"When several different subjects are proposed for amendment or for enactment in the Federal Constitution by means of the popular initiative, each must form the subject of a special petition.

"Petitions may be presented in the form of general suggestions or of completed bills.

"When a petition is presented in the form of a general suggestion, and the Federal Assembly agrees thereto, it is the duty of that body to elaborate a partial revision in the sense of the petitioners, and to refer it to the people and the cantons for acceptance or rejection. If the Federal Assembly does not agree to the petition, then the question whether there shall be a partial revision at all must be submitted to the vote of the people, and if the majority of Swiss voters express themselves in the affirmative, the revision must be taken in hand by the Federal Assembly in the sense of the people.

"When a petition is presented in the form of a completed bill, and the Federal Assembly agrees thereto, the bill must be referred to the people and the cantons for acceptance or rejection. In case the Federal Assembly does not agree, that body can elaborate a bill of its own, or move to reject the petition and submit its own bill or motion of rejection to the vote of the people and the cantons along with the petition.

Art. 122. "A Federal law shall determine more precisely the manner of procedure in popular petitions and in voting for amendments to the constitution.

Art. 123. "The revised Federal Constitution, or the revised part thereof, shall take effect when it has been adopted by the majority of Swiss citizens who take part in the vote thereon and by a majority of the cantons.

"In making up a majority of the cantons, the vote of a half-canton is counted as half a vote.

"The result of the popular vote in each canton is considered to be the vote of the canton."[1]

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[1] The statute required by Art. 122 has been a source of much trouble to the Federal authorities. The law is dated January 27, 1892, and regulates, as far as is possible, the collection of signatures, sets the time allowed the Federal Assembly to make known its decision in the different cases (a

Swiss democracy is breaking the way for the democracies of the future. All the institutions it establishes, all the experiences it undergoes, possess for the student of political science an interest which far transcends the narrow limits of the country where this evolution is taking place. It is of importance to her, as well as to the progress of democratic societies everywhere, that the step she has just taken be described and criticised. Experience alone will pronounce upon it in last resort, and enable us to say with certainty whether it was a false step which she will have to retrace before resuming her assured march onward.

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year), directs how the popular vote shall be taken and how the writs shall be returned. The following articles are devoted especially to the case of a completed bill: —

Art. 9. "If the councils do not agree in reference to a project presented by the popular initiative in the form of a completed bill, this project shall be submitted without further formality to the vote of the people and the cantons.

"The procedure is the same when the Federal Assembly approves the project.

Art. 10. "If the Federal Assembly does not approve the project, it submits it to the vote of the people and the cantons. It may at the same time present a motion of rejection or submit along with the other a plan of its own, bearing upon the same constitutional question, to the vote of the people and the cantons.

Art. 11. "If an independent project is elaborated by the Federal Assembly the two following questions shall be submitted to be voted upon: —

"*Will you accept the plan of revision emanating from the popular initiative?*

"*Will you accept the plan elaborated by the Federal Assembly?*

Art. 12. "Blank or irregular ballots are not counted.

"Those ballots which answer only one of the questions by *yes* or *no*, or those which answer *no* to both of them are valid.

"Those are irregular and void which answer both questions in the affirmative.

Art. 13. "The project which obtains a majority of the votes and of the cantons is accepted."

On the one hand, this law augments still more the importance of the

But, while awaiting the verdict of events, we can and we must formulate those theoretical objections that occur to us when we approach the study of the new chapter of the Federal Constitution from the standpoint of law and history.

We have already said that, when the distinction is once made between total and partial revision, it is both logical and prudent to grant the people the initiative in regard to the second when it already exercises it in regard to the first. Otherwise, the voters, to whom the realization of a special reform is proposed, may be given unfortunate alternatives,

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activity of the 50,000 in constitutional matters by ordaining that if there is diversity of view between the councils, the project elaborated outside them is submitted to the people and the cantons without a recommendation of any sort, and on the other hand, it permits the Federal Assembly, if the two councils agree upon a counter-project, to weaken the petitioners irretrievably, by dividing their majority by a proposition differing little from their own and capable of winning enough of their number to give the final advantage to the pronounced adversaries of both.

The Federal Council has proposed without success the conditional vote practised in representative assemblies, a plan which requires the taking of two distinct votes. In the first, the voters would have declared which of the projects could obtain their approval in case the constitution should be revised. In the second, they would have pronounced upon the necessity of a revision, in the sense of the project eventually accepted. That was the only procedure "capable of showing the real will of the people." (Message of July 28, 1891.) Accepted by the Council of States, it was rejected by the National Council as too complicated. The government proposed that in the final vote the citizens should be consulted as a whole, and not those of the different cantons as distinct political units. The Council of States desired to have the votes of the cantons included. Long debates only showed the numberless difficulties which defy the application of the plural initiative to the revision of a constitution like that of Switzerland. Weary of the struggle, they yielded to the National Council, and its plan, simple in appearance, became law.

No special gift of prophecy is needed to predict that this law has vexations and difficulties in store for the Federal authorities and surprises for the country.

of either opening the door wide to all sorts of alterations or of renouncing an improvement because they do not wish to run the risk of what may happen in the course of deliberations over which they themselves are unable to exercise any restrictive control. But we must not forget that the distinction between total and partial revision is not a distinction of law. Where does the one begin? Where does the other end? These are questions of fact only, to be answered according to each particular case. This or that modification of a single fundamental article may be more important than an entire series of minor changes, covering a great number of articles, and which might for this reason be qualified as a total revision. If the above distinction may justify a simplification of the constituent procedure in the case of partial revision, it plainly cannot justify a transfer of constituent power. There are serious reasons why a decision, resting only upon considerations of policy, why a procedure, chosen or adopted arbitrarily, should not involve the delegation of a part of the work of revision to a new authority. Such, however, is the effect of the provisions permitting 50,000 citizens to present in a completed form one or more constitutional articles, destined, if sanctioned by the people, to be incorporated bodily into the fundamental law of the State.

In running through the debates from which the complicated, and at times obscure Art. 121 emerged, one detects absolute confusion between the two ideas which we have aimed to sharply distinguish; namely, popular initiative and plural initiative, the initiative of all or of the majority, which by virtue of an accepted fiction expresses the general will, and the initiative of a group. Indeed, it seems quite likely that it was because of this confusion that the system, borrowed from the constitution of Zürich, finally usurped the place of the one formulated by the

government, which was only the pure and simple development of existing Federal law. The expression "popular initiative," which in the latter might be understood as covering the action of the voters themselves, merely called forth by the *demand for the initiative* of the 50,000 petitioners, has in the former been applied to the action of the 50,000 themselves. It has become synonymous with the demand itself, as we may see by comparing the rejected project with the adopted counter-project. "The people," so runs the text first adopted in the National Council, "may also demand, through the popular initiative, the abrogation or modification of special articles."[1] The final article said: "The popular initiative consists in a demand presented by 50,000 citizens."

It must, however, be borne in mind that the real nature of the right proclaimed by the constitution of 1848, — a right hardly exercised as yet, nor ever thoroughly investigated, — was very generally misunderstood at the time of this discussion of Art. 121. The theory current among the public was that the 50,000 citizens who might demand a consultation of the people upon the question whether or not the constitution ought to be revised, were in that act exercising the popular initiative. This opinion, arising from a superficial examination of the documents themselves, was favourable to the transition from the old system to the new one, which expressly endorses this view. That they were making a transition they did not dream.

If we consider the legal definition of the initiative, we cannot deny that those who use it for purposes of constitutional revision take, in this way, a direct and

[1] The preliminary plan of the Federal Council was expressed less clearly: *On peut aussi* . . . The more preferable wording, *Le peuple peut* . . . was due to the committee of the National Council.

effective part in the exercise of the constituent power. Hence it happens that a given fraction of the whole body of voters is able, provided it only aims at a so-called *partial* revision, to secure a constituent mandate almost as extensive as that of the people's representatives acting in concert with the representatives of the cantons. Is this what Swiss democracy, so jealous at times of its Federal organization, desired?

Another confusion of ideas, which plainly influenced the authors of the amendments of 1891, was the assimilation of constituent with ordinary legislative functions. We find again and again in their speeches the assertion, whose real importance we have considered, that the initiative by bill exists in most cantons, and with good results. Many add that this institution, which ought to be introduced into Federal law, is the necessary complement of the referendum. Some go so far as to pronounce it the best method of securing minority representation. In vain did M. Schenk show, in the first debate in the National Council, that the legislative initiative and the constituent initiative are two different things, that ordinary legislation moves within certain fixed limits, determined by the constitution, while the revision of the latter knows no limits, regards *everything* as possible. This theory, which in a constitutional state is the only sane interpretation of the law, meets with no response in the Council of States. It has against it, on the one hand, the tradition of the small cantons, which enjoy pure democracy and where the written constitutions are a foreign importation, whose full usefulness is not appreciated; and on the other, strangely enough, it encounters among the jurists of the great eastern and central cantons the doctrine whose fortunes in Prussia and the great Empire of 1871 we have traced. The jurists of German Switzerland are, very

naturally, susceptible to the influence of German science. It requires much independence of thought and strong individual effort for them not to give their unqualified adhesion to doctrines which they have heard so ably and authoritatively defended in the universities where ordinarily their studies are completed. It is hardly necessary to add that if there is any time when their fellow-citizens ought to desire them to have this independence, to make this effort, it is when the public law of their country is concerned.

Leaving the legal ground, and looking at the question from a purely political standpoint, we discover other faults in the system of the plural initiative in cases of constitutional revision. It may be that these defects are not yet apparent; but they will reveal themselves some day, without doubt, and even though the practical wisdom of the Swiss people should save them from their consequences, whoever has at heart the future of democracy in Europe should call attention to them.

The initiative by completed bill increases considerably the importance of two factors of our public life, either of which may at one time be the best of things, at another time the worst. The first of these, the right of association, has often in many countries been a means of progress. But every one knows what a pernicious rôle the *clubs* played in France, at a time which stands in history as a period of unparalleled violence and lawlessness; and men are beginning to see, now that they are seriously studying American politics, how dangerous to real liberty are the *rings* of the United States. The second of these factors is the daily press, which now occupies a place beside of, and sometimes above, the constituted authorities, and may become, according to the motives which actuate it, according to the personal worth and disinter-

estedness of the men who control it, either the wise and vigilant adviser of democracy or its evil genius. The cardinal evil of the influence exercised by public associations and by the press, when this influence is preponderant, is that it proceeds from powers which, in a political sense, are anonymous and irresponsible. By means of the provision which allows a fraction of the electoral body to interfere directly in public affairs and to participate in the exercise of the constituent power, this influence will gain the ascendency over the others whenever there is an attempt to call forth such a participation.

A private citizen, though he be sure of the support of other private citizens like himself, will not attempt to secure 50,000 signatures for a bill drawn up by himself. To effect this, an association or a newspaper will be necessary. The article which may one day become an integral part of the constitution of the land, which future legislators will have to respect in the discharge of their duties, which judges will be called upon to apply, and which jurists will have to expound and interpret according to the spirit of the public law and the intention of its authors, this article may be framed behind closed doors, in some editor's office, or around the council board of some anonymous committee. As soon as it is signed by two persons its provisions are final, no amendments may be made to it. It goes forth, perfect and unchangeable, to solicit, one by one, the support of the citizens.

If the reader wishes to know how this solicitation is conducted, or was recently conducted, in Zürich, let him read the deposition, which cannot be suspected of being too unfavourable, of a magistrate of that canton, Mayor Stüssi, one of the most ardent advocates of the extension of popular rights. "To triumph over all resistance," he says, "appeal is made to party discipline. All the various social

influences are set in motion. Considerations of personal friendship, of business relations, enter into play. Women are induced to sign for their husbands, sons for their fathers. The refractory are simply besieged until they yield for the sake of peace. Their adhesion is rendered more easy in that their consent is only asked, upon the authority of which their names are inscribed. As a rule, it is impossible to allow those who sign time enough to examine the project and the reasons adduced in its favour; they are simply told approximately what the question is; and in this particular, a little straining of the truth here and there is natural in the heat of the campaign."[1]

Some of these abuses to which M. Stüssi calls attention may be remedied by legislation. Some have been, but not all of them can be thus corrected. Particularly is it impossible to compel the signers to carefully examine the document which they are induced to sign. This evil, which amounts to nothing when the question is merely that of demanding a previous consultation of the people, becomes one of the greatest of dangers when the people are put in a position to co-operate directly in what may be called the technical part of the process of constitution-making.

Mayor Stüssi, an experienced and enlightened democrat, severely condemns the plural initiative. He would see it replaced in his canton by a more completely developed form of the *individual initiative*, which was established there, in a rudimentary form, by the constitution of 1869. He would have every one who desires to exercise this right present his project to the Cantonal Council. In the session following the presentation of such a project, a committee is appointed to examine and discuss it with

[1] *Referendum und Initiative im Kanton Zürich*, Horgen, 1886, p. 79.

the originator and his friends. At the termination of the labours of this committee the results are published, and after the lapse of a certain period, if the project is still maintained by its author, as at first conceived, or with amendments to which he may have agreed, the voters are called upon to decide upon it definitely.

An almost entirely new form of democratic government would be thus realized, by the substitution of one form of initiative for another. Once more we see that in this domain no detail is insignificant, and that, above all, we must not allow ourselves to be satisfied with words, whenever that complex and novel chapter of political science which treats of "popular rights" is under consideration.

A discussion, however superficial and limited, of M. Stüssi's system, which has also been approved by the Zürich section of the *Grütliverein*, would exceed the limits of this study. It is not incumbent upon us to ask under what conditions it would be practicable in a state larger than the canton, where it already has numerous advocates. But we emphasize the fact that if initiative by completed bill be admitted, the Zürich plan is, theoretically, the only one which, on the one hand, preserves the right of the common citizen, who ordinarily is neither a journalist nor an influential member of a political association, and which, on the other, furnishes practical safeguards against the elaboration of documents of public law by unknown individuals. The citizen who thus enters into collaboration with a parliamentary committee must, it is true, be assumed to possess a certain amount of intelligence and firmness of purpose; but these are qualities which the most extreme democracy could not do without in its legislators. It is probable that in practice this citizen would be the spokesman of a group, and that in this

way that form of government would be attained, which perhaps is to be that of the future, in which laws are to be made by the representatives of numbers working in concert with the representatives of interests.

To return to the Federal Constitution, a final and no less grave charge that may be brought against the provisions by which the articles of 1891 have regulated the initiative in partial revision is, that under their cover any measure whatever may be passed. No text defines what belongs to the constitutional order, and what does not. If a new amendment is not made, which shall give the Federal Assembly the right to compel initiators to recognize the distinction between the domain of constitutional revision, strictly speaking, and that of legislation, or even of the executive and judicial powers, we may be sure that they will not do it. Matters of the most dissimilar character will become the objects of "completed bills," and if these projects are presented in the form of constitutional articles they must, whether wanted or not, be submitted to the vote of the people and the cantons.

At the time when Swiss democracy took this leap in the dark no one dreamed how immensely far-reaching this new popular right would prove to be. Men had before them the limited initiative, as in operation in most of the cantons, and, as a result of that confusion of mind to which we have called attention, thought they were establishing something similar in the Confederation. What they then established may serve to completely overthrow the foundations of the Federal government unless constant vigilance prevents.

"By means of the initiative," says M. Jacques Berney, professor in the Lausanne Faculty of Law, "the Swiss people may govern themselves freely in every domain.

They may enact laws, adopt a penal code, naturalize foreigners, grant amnesty, contract loans, convert the public debt, grant subsidies, conclude or reject treaties, declare war, make peace, frame a revenue tariff, abolish duties, try cases, pronounce judgments, annul sentences of the courts, condemn citizens to death, etc., etc., etc.; they may do anything they will, upon the sole condition that they inscribe it in the constitution."[1]

This, of course, is an extreme statement of the situation. It is by no means probable that the Swiss voters would ever really go so far as their rights might theoretically allow. Indeed, for our part, we believe that as soon as the Swiss people see all that they can do, in other words, all that they might be induced to do in an hour of excitement, they will at once seek to regulate their power. We are constantly obliged, in common speech, to say *the sovereign people*, when in order to be accurate we ought to say *the electoral body*, which speaks for it; but they are not therefore identical. We also sometimes say *the people* when we mean only a fraction of the voters. This is done unconsciously by those who confound the plural with the popular initiative. This was done by the Jacobins of 1793 when they led the sections of Paris to the bar of the National Convention and called them *the French people.* But the illusion of words is only transient. As soon as the real sovereign perceives that this illusion is being used to attribute to it desires it does not possess, it will soon find a way to a proper adjustment of things.

Men have been able to see in the last few years that Swiss democracy has advanced by leaps and bounds in the

[1] Berney, *L'initiative populaire en droit public fédéral.* (Contribution to the *Recueil inaugural de l'Université de Lausanne*, Lausanne, 1892, p. 5.)

path of direct government, and are beginning to speak of its exaggerations. In what concerns the Federal domain this phenomenon has, among other causes, one which is not sufficiently well known to those who are called upon to pass judgment upon it, and which it is very necessary to take into account. The arrangement of the electoral districts is not satisfactory, and the majority party, to which it has thus far assured a preponderance in the National Council, has taken advantage of the difficulties which the existence of cantonal frontiers puts in the way of a rearrangement to refuse the changes demanded by the opposition and, we may say, by public opinion. Hence the antagonism which has recently shown itself between the nation and its representatives, and the constant agitation of the minorities, united on this question, for recourse to the people. It is this abnormal situation which has made the right of initiative, under its well-known form, seem to many a political necessity. When this situation shall cease, the country, which is both practical and prudent, will very soon recognize that its real progress does not consist in the annihilation of its chosen and responsible councils.

When an assembly initiates a measure and submits it to the people, it becomes its sponsor. Not only does it assume a responsibility, as a corporate body, but the members of the minority as well as of the majority have to answer before the people for the opinions they hold. The confidence that citizens may repose in men whom they have chosen, whom they have seen at work, and whose discussions they have been able to follow, is an assurance of the very highest importance. With the great majority of voters, who can hardly be expected to devote much time to the study of constitutional law, this will be of the greatest weight in the formation of their opinions and the

determination of their vote. To improve the composition of the assemblies which are expected to furnish this guarantee; to bring it about that not only the voice of numbers, but also that of interests, which cannot be counted by heads, may be heard in their debates; to secure, by the rational exercise of popular rights, the moral contact which should exist between the legislature and the people, whose authorized representative and counsellor is the legislator, is more useful, more fruitful, and wiser than to substitute the action of officious committees, of irresponsible, unauthorized delegates, for that of the legal representatives of the nation.

The reputation for intelligence and maturity which Swiss democracy enjoys is great and merited. It will soon be put to a severe test. The exercise of the new right given to 50,000 citizens by the amendment of 1891, the way in which its dangers are to be avoided, its consequences appreciated, and, perhaps, its conditions modified, will be followed with the greatest interest, far and wide. In the world of thought, contemporary Switzerland has become an important power. Only yesterday, split up into twenty-two petty nations, it possessed but the rudiments of federal institutions. Its political history was too local, too diverse, to be much studied abroad. Popular government was being gradually evolved in the obscurity of the cantons. But this is no longer the case. The constitutions of 1848 and 1874 have brought order out of chaos. Men have seen in the heart of Europe, the rise and persistence of a democratic state, sufficiently large to furnish the world with an example, which may be quoted with advantage, which is being quoted every day. Evidence is being furnished to societies which are profoundly moved by the spirit of modern progress.

The Swiss peasant, journeying to the next village in his

Sunday garb to deposit his "yes" or "no" in the urn at the schoolhouse, would shake his head incredulously, if told that his act may have an interest for men outside of his own country, living far away beyond the mountains. Yet such is the case. The old historic nations are marching one after the other, or are preparing to march, toward democracy, like the columns of an army, slowly advancing into an unknown country. This peasant is a scout of the advance guard of this army.

CONCLUSION.

If we take a general view of the systems of revision in vogue in those countries which possess written constitutions, passing by all unessential differences, we may reduce these systems to two general types: revision by the constituted authorities, and revision by the people. The former springs historically from a semi-mediæval conception of the state, by which sovereignty is divided between the prince and the representatives of the nation, and under the influence of which the constitutions have taken on the character of compacts between two parties. The latter is the one whose foundations were laid by the Revolution, and which has been developed in the democratic states of our time.

The states belonging to what we have called the German group have remained for the most part under the influence of the traditions of the old regime. Some have preserved, though in a modified and softened form, the theory of a two-sided contract. Others have abandoned it almost completely, but at the expense of the peculiar character of the constituent function. Among the latter this function has become purely and simply an act of legislation. Among the former it is discharged by the legislative powers, but according to a procedure whose forms are complicated and solemn, and in which something of the original contractual character still remains.

The monarchies of the Latin and Scandinavian group have gone a step further and accepted from the modern

theory the principle of consultation of the people. They confide the revision of the constitution to the established authorities, but the final decision is reached only after the complete renewal of the popular chamber by general elections, or by the temporary substitution of a special assembly invested with full powers in the place of the ordinary legislature. Everywhere, except in Greece and, according to the doctrine formulated and defended by the Storthing, in Norway, the prince shares in all constituent work.

The states which proclaim the unconditional sovereignty of the nation have a system of revision by the people, or in the name of the people. In some of these states, it is true, the constitution is altered by the members of the legislative bodies; but in that case they act by virtue of a special mandate, expressly given or tacitly assumed. They ordain or establish in the name of the people.

Of the two kinds of revision which may be distinguished in practice, total and partial revision, those constitutions that have ever felt in any measure the influence of the contractual theory, provide in their amendment articles for the latter only. In the summary with which we closed the series of chapters devoted to those states, we pointed out the general principles governing them. To speak of them again would be superfluous. The question which remains to be examined, in conclusion, is that of the lessons to be drawn from a comparison of the popular constitutions, and especially of the experience of the United States of America, France, and Switzerland.

If we discard whatever is secondary, the debatable points of procedure in this or that special case, or the political solutions conjured up to meet the necessities of the moment, and if we ask what is the nature of the constitu-

tion in those countries where the Revolution has worked out its ultimate consequences, we can only reply with M. Émile Boutmy, "It is an imperative law promulgated by the nation."[1]

The author of the *Studies in Constitutional Law*, a little book worth many large ones, gives the above definition in speaking of the constitutions of France, but it is equally applicable to the constitutions of the states of the American Union and of Switzerland. M. Boutmy adds, still speaking of France: —

"And within the nation there has been and is nothing solid and stable but individuals. For it was necessary to find a solid foundation on which the State could rest, and to dig deep to clear away the rubbish left by the crumbling edifices of the ancient political bodies. The determination of individual rights was, then, the first and principal question which came before the French legislator; all French political history gives evidence of its priority and pre-eminence. From this question we have derived a very simple and very precise conception of sovereignty. The nation, for reasons which have been explained, cannot, in France, be anything but the whole body of citizens. Theoretically, sovereignty is the will of all the citizens, and practically it comes to be the will of the numerical majority. In France, since 1789, this majority has been, in fact, the sole and necessary source of all legitimate authority. The existing powers are all creations of this majority, and all are based on the constitution which is its work. Any power which is suspected of not representing it, or of misrepresenting it, loses, in a sense, its justification for existence, and is marked out,

[1] Boutmy, *Studies in Constitutional Law*, Dicey's translation, p. 154.

by the want of harmony, for immediate destruction or transformation. There is no fulcrum *outside* the majority, and therefore there is nothing on which, as *against* the majority, resistance or lengthened opposition can lean."[1]

This could not have been said in 1789 in America. Upon the establishment of the Federal Constitution, the people of the United States had been proclaimed sovereign, but it was not yet, in fact, the real sovereign of the Union. Particular sovereign bodies stood constantly above it and were destined long to maintain this unconstitutional pre-eminence. More than once have they been "a fulcrum outside the majority." Nor would these definitions have been any more applicable to the Swiss Confederation of 1848. At present all that is needed to render them applicable to both the American and the Helvetic republics are certain slight alterations whose importance, it is already apparent, will constantly decrease. The public law of the American states and the Swiss cantons has always shown this characteristic in the same degree as the public law of France.

To study the evolution of modern popular government we must turn to the political history of these three countries and by no means, as Sir Henry Maine declared,[2] to that of half a century of violence and commotion in the states of South America, not yet emerged from the Revolutionary period. The institutions of Switzerland and the United States may be compared with each other in every respect, and with those of France, if we make certain reservations inherent in the nature of federal constitutions as opposed to a centralized form of government.

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[1] *Studies in Constitutional Law*, p. 155.
[2] Maine, *On Popular Government.*

These reservations are unnecessary, legally speaking, in a comparison between the French constitution and the constitutions of the individual states of America and the cantons of Switzerland.

This being the case, it appears possible, after the comparative study we have just made, to determine precisely the principle which governs contemporary democracy in the exercise of its constituent powers. This principle is proclaimed in the immense majority of constitutional texts which we have had occasion to examine, and dominates the entire development of the public law of those nations whose constitutional history has been the chief object of our investigation. It may be formulated as follows: The constituent power is wielded directly by the people for purposes of sanction; directly or through its representatives for purposes of initiation. In other words, — considering sanction alone, which shows the essential characteristic, — the imperative act which gives being to the fundamental law proceeds directly from the body of qualified voters, sole possessors of the sovereign rights of the nation.

The popular vote in constitutional matters has long been successfully established in the United States and Switzerland. In France it has experienced a check, but there too, if the precedents and traditions be taken into account, it must be conceded to be a fundamental institution of the new regime and consequently an institution destined to reappear sooner or later. It is a part of the Revolution's bequest and in the country of Lafayette and Condorcet it is no longer possible to displace it. The abuses of the consultation of the people perpetrated by the emperors, have prejudiced the enlightened and liberal of every school against it. Even the very word "*plébiscite*" is in disfavour. These prejudices, still very

strong since the fall of Napoleon III., will certainly disappear in time. There is already more than one indication of this. Appeal to the people was for many years the rallying-cry of a party which attacked the very form of the government. To-day the situation is changing. Devotees of the Republic are more and more rallying to the ideas that Laboulaye so earnestly advocated. Gambetta himself, in his speeches on the popular vote of 1870, marked out the way. February 9, 1889, M. Tony Révillon, chairman of a committee appointed to examine the project of constitutional revision presented, after eight others, by the Floquet ministry, announced in the chamber that the committee had declared by six votes against four for the principle of popular ratification. This was the first time in a long while that such a proposition had been made upon the floor of the chamber in an official report by adherents of the Republic, and there is every reason to believe that it will not be the last.

As yet only amendments of little significance have been made in the constitution of 1875. Whenever the day arrives when the legislators of France shall desire to bring about a reform of some importance and when they will have to reckon with a public opinion daily becoming stronger and more exacting, they will be compelled to give that public opinion a legal way of making itself heard. Independently of the fact that the Senate is not entirely composed of representatives of the nation it should not be forgotten that the deputies are chosen for four years and that during that period, as the experience of every country under the representative regime shows, their opinions may cease to be those of their constituents. Now Art. 8 of the law of February 25, 1875, makes no provision for general elections either before the final passage of the act which resolves the National Assembly into a constitu-

tional convention, or after its passage, before assembling in the new capacity. The custom of England, so often invoked to justify the bestowal of extensive powers upon Parliament, does not allow in any case the adoption by the House of Commons of a bill effecting important reform in the constitution, unless they have previously received a new mandate to that effect from their constituents. In none of the parliamentary monarchies of Europe, outside the German group, may the charter be revised until the representative body has first been dissolved and a new one chosen. If a revision of some fundamental article of the constitution of France should be effected without a previous completion in this particular of the procedure established by the law of 1875, the French Republic would be not only the only democratic state but also the only free country in Europe whose constitution may be legally changed without an appeal to the people.

The right of the French people to be consulted in regard to the fundamental laws of the state is inscribed, as we have seen, in the Declaration of 1789. Nor has it remained a dead letter but has, on the contrary, been often defined and affirmed by usage. It is a part of the unwritten constitution of France. Revolutions may, and frequently must, suspend the exercise of such a right, because the essential conditions of a normal, popular vote are peace and freedom of choice. That a nation may, in the plenitude of its sovereignty, make a constitution, it must have a choice between two alternatives, between an old written constitution or customary regime and a new one. Now by a revolution custom is broken, the old constitution no longer exists; and if the nation is then asked to ratify a new one, a part of its sovereignty has already been exercised, in fact and without its order,

by those who have framed the new document; for most often a negative vote, though the election be apparently free, is forbidden by the imperative necessity which society feels for order and the laws which secure it. This consideration, which may justify the action of a revolutionary body proclaiming a provisional constitution, ceases to be tenable as soon as the new regime is so well established that the reign of law, internal peace, and security from without are definitely attained. Then an enlightened nation may undertake to express its will with entire freedom.

In 1822 the people of New York State ratified a new constitution replacing the one which had been promulgated in 1777 by the convention which adopted the Declaration of Independence, and which had been revised in matters of detail in 1801 by another convention whose decisions were not submitted to the people for ratification. If the people had then rejected the work of the Albany Convention, the constitution of 1777 would have remained in force and none of the constituted authorities of the state would have been shaken. Whenever the French people shall be called upon to pronounce upon the work of a national assembly, it will be, legally speaking, in an exactly analogous position.

We have seen how the direct vote of the people upon constitutional measures has gradually spread throughout the United States, how in one state after another the people have been admitted to the exercise of their highest prerogative. This is why the popular vote has there developed normally, occasioning neither reactions nor surprises. It has not been thus in France. The right of the people to participate in the formation of their supreme law was proclaimed the very day of its emancipation, and the application of the principle shortly after in the very midst of revolutionary convulsions brought more than a

million newly created citizens to the polls. The experiment was a bold and hazardous one and its outcome was unhappy. Nevertheless, it has been made and repeated. The initiation of the people into their rights was brusque and violent, but it has taken place. In 1793, more than a century ago, the popular assemblies of France were consulted for the first time. The political education of the French began then and has continued in the midst of revolutions. Dearly have they paid for it in mental suffering and in human lives. No doubt it is still far from being finished; the school of democracy has but just been opened. But it cannot be denied that they have greatly progressed and that the strongest factor of their intellectual development is the knowledge and exercise of their sovereignty. Those who deny the French people all participation in the making or revising of their constitutions are prone to disparage their judgment and coolly declare, when the example of foreign democratic states is cited, that no comparison is possible. Is the France of to-day, furrowed with railroads and lines of communication; enjoying a free press whose readers are numbered by millions; with laws which have made education gratuitous and compulsory; with self-governing communes, and with forty-five years' experience in the use of universal suffrage; is the France of the Third Republic less advanced than the America of 1822?

The reasons we have advanced seem to us to show sufficiently that the principle of direct consultation of the people has only temporarily lost, in French public law, the sanction given it by the texts. If, then, in speaking of this right at the present moment, we must classify Art. 8 of the law of February 25, 1875, apart, that cannot invalidate the general conclusion to which we are led, as to the character with which modern democracy

has invested the act of constitution-making. This character is not ephemeral, vanishing with the memory of the events which give it rise. The democratic state has adopted and sanctioned it because it satisfies the very principle upon which a democratic state is based. If the fundamental law springs from an imperative act of the nation, and if there can be no such thing as absolute identity between the will of a nation and that of a single man or an assembly chosen by it, the nation alone can accomplish this act.

Few men are bold enough nowadays to assert that the will of a nation may be absorbed in that of an individual. But it is still asserted that it is necessarily identical with that of representatives or delegates chosen by universal suffrage. Contemporary experience most abundantly disproves this theory. The example of the Swiss people who, in 1872, rejected a constitution which its representatives had adopted by a majority of more than two to one, in a legislature chosen specially for the purpose, is itself conclusive, but it is far from being the only case. In a list of the numerous popular votes to which the revision of constitutions has given rise in the states of the American Union and in the cantons of Switzerland, the roll of votes in the negative would be almost as long as that of those in the affirmative. In 1880 the Grand Council of the canton of Geneva enacted a constitutional law, separating the Church from the State. The legislature had been chosen only recently. The question had not been put categorically in the course of the election campaign; but the victorious party had achieved a brilliant success. Submitted to a popular vote, the law was rejected by an overwhelming majority, in an election which showed the greatest proportion of participants ever recorded.[1] To say after

[1] In the following elections the authors of the popular law were driven from power, not to recover it for ten years.

that, as is often said, that the choice of representatives is equivalent to the most formal popular vote, is to simply turn one's back upon the evidence.

A general election is not the act of a single sovereign will; it is a collection of special acts. In the states which inaugurated the representative system, the delegate only represented the district which had chosen him.[1] He has become a representative of the country only by virtue of a constitutional fiction. Even a hasty examination of the electoral laws in force shows that in the different elections which centre in the choice of a House of Representatives or a convention, — and this is particularly striking in the case of election by districts (*scrutin d'arrondissement*), — the proportion of the majorities and minorities may be such that a numerical majority in the country may be represented by a minority in the representative bodies and *vice versa*. This is the A B C of politics. The state which admits that an elected assembly may itself exercise the sovereign power in all its plenitude, in the name of the people, is therefore liable to receive its fundamental law from a will which is not that of a majority of the citizens. If this should occur, this law would no longer be an imperative act of the sovereign. Such a condition of affairs modern democracy wishes to avoid, and for this reason it presses the popular vote into its service, as the only possible legal solution of the problem of the exercise of the constituent power in the terms in which it has defined it.

Leaving the standpoint of law, it has often been asserted that universal suffrage can only decide questions of persons, can only judge of the merit of its representatives, that all other questions lie beyond its competence. This

[1] This is still, legally speaking, the position of the members of the House of Commons in England.

is a grave indictment of democracy. If the private citizen would estimate at their true value the personal worth, the intellectual abilities of the candidate who asks his support, he would find himself confronting the most complex and delicate question conceivable. If, on the other hand, he has to choose between two political programmes, his problem is simpler; but then it is no longer a question of persons, and it is just as easy to formulate an opinion upon a well-defined constitutional amendment as upon any other political programme. And, finally, if a voter lets himself be guided by the confidence he reposes in the candidate, by reason of his position in the nation, or his name or reputation or general bearing, his difficulty will not be increased if called upon to pass judgment upon a proposition which his representative may have voted for or against. The representative who has prepared the constitutional law may and ought to seek by the authority of his words and acts, an endorsement of his work from his constituents. This is nothing more than his duty. Thereby is he exonerated. What is wanted of the voters is a formal assent, a sanction, not an act of legislation. This legislative work has already been done, the bills arising from it have been discussed, the opinion of the minority against them has been overcome in the assembly and the final project embodies that of the majority. The people are then called upon to declare which side they will take. This is their right. If they approve the work of the majority and vote in the affirmative, they do not thereby determine the formula for a constitutional rule, but they give it binding force.

A healthy democracy demands that its representatives initiate their constituents as far as possible into a knowledge of their labours. It wishes them to be the political educators of the people. It does not wish to have them

ever become its masters. This is the reason why it often rebukes sovereign assemblies. If we keep in mind what ideal democracy is pursuing, while we may perhaps excuse these assemblies, and admit that necessity often justifies their acts, yet we can never defend them on principle.

As soon as the popular vote can be realized under normal conditions it ceases to be a source of agitation. It is a truth proved by the experience of both America and Switzerland that votes upon constitutional matters inflame the public mind much less than ordinary elections. M. de Bousquet de Florian who attacks them, in a thesis already quoted, without perhaps having studied them deeply enough, attributes to them what he seems to regard as a public calamity, the numerous revisions which the constitutions of the American states and Swiss cantons have undergone. But if, for instance, he will take the trouble to consult the history of Maryland and Georgia, which were slow to adopt the popular vote in constitutional matters, he will find that these states are far from being behind the others in the frequency of their constitutional reforms. The same author, advancing the undeniable fact that parties often use revisions as a means of political agitation, declares the popular vote to be the arm with which the political factions seek to gain power. This is allowing one's self to be misled, in passing judgment on an institution, by the memory of the abuses perpetrated, at certain times and in a single country, upon both the word and the thing. Let anyone take a wider view of the subject, enlarging the scope of his observations, and he will see that it is against this very popular vote that most of the violent and illegal attempts in contemporary democracies have been shattered.

When, by a written text, a constitution is made precise, definite, open to direct attack, this text bears the

signatures of certain men. Considerations for its stability demand that the consequent personal character be effaced as soon as possible by the nation, especially if its authors are adherents of a party. For individuals, exposed to the dangers and risks of a political life, may some day, for one reason or another, lose the confidence of the people, and if the people regard the constitution simply as an affair of their delegates, it will be threatened. That the supreme law may have a firm and solid basis, it must rest upon the express consent of the people. Until this consent is given the constitution is vulnerable. It is and will remain provisional despite all the votes of assemblies. This follows from the democratic principle as necessarily as weight from the principle of universal gravity.

By the popular vote upon constitutional measures, the two essential conditions of an amendment procedure, so hard to harmonize, yet indispensable, are attained; namely, the overcoming, on the one hand, of the rigidity of written texts, by facilitating amendments, and on the other the stability and prestige of the constitution. If the first of these conditions is fulfilled, the principal defect which the partisans of an exclusively customary public law find in written constitutions is corrected, and if the second is fulfilled, the character which constitutes their principal merit is preserved. In this way the advantages of the English system are secured and the institutions of the democratic state obtain a fundamental guarantee which that system would be powerless to give. This twofold merit answers the obviously characteristic need of the times: ceaseless and rapid progress, effected without violence and firmly securing its achievements by a powerful, universally respected law.

In the field of politics, the most pressing problem of the period, whose threshold we have already crossed, is the

harmonizing of the rights of the individual proclaimed by the Revolution, and of the needs of society which are becoming daily more apparent. Science is establishing more and more firmly the great law of solidarity, the close dependence of each upon all. The sentiment of justice is growing, its base is widening, its aim is higher. What our fathers called natural liberties, the rights of man, those rights anterior and superior to the state, whose proclamation was to cost so much suffering and life, are today considered by a growing school, whose doctrines are becoming those of the rising generation, as duties which society and its representative, the state, may restrict in the interest of the community. These conclusions are undeniable, at least in so far as they concern the least individual of these rights. The development of contemporary legislation proceeds in this sense. Does this mean that the rights of the individual are condemned to disappear before the rights of the community? Certainly not. But men's ideas of rights are undergoing a transformation; they are no longer absolute, inviolably sacred. The rights of the public, commanding ever greater attention, are rising in opposition and the conflict has begun. Those who believe in human progress have faith in the future. They believe with ardent conviction that society will emerge from the crisis with an organization better suited to the realization of its ends. But in this shock between the state and the individual, the infinitely great and the infinitely small, the organs of the state may be led to abuse their power, to trample upon right. Then more than ever will the individual need to seek protection under the shield of a written constitution, and this, more than ever, must be above and beyond the reach of every power that may be hostile to liberty.

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